Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 4)

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-257 OF 1996
ABDUL MALIK ISHAK J
7 MARCH 1998

Injunction *— Setting aside — Injunction granted to restraint defendants from manufacturing, exporting or selling cosmetic sponge products resembling those of plaintiffs' — Breach of fiduciary duties and trust of defendants who were also director and manager of plaintiffs — Whether injunction should be set aside*

In 1970, the second plaintiff started a joint venture manufacturing company in Malaysia by teaming with two Malaysians. For that purpose, the third defendant was incorporated. About a year after the third defendant started operations, the two Malaysians sold their shares to the first defendant and his family. In March 1987, the first defendant and his brothers were informed that the second plaintiff had developed a cosmetic sponge with a successful market in Europe and the United States. A new joint venture company ('the first plaintiff') was set up to manufacture such cosmetic sponge and the third defendant was used to invest and hold the 30% of the shares of the first plaintiff. Subsequently, the first defendant and his brothers requested that the third defendant's share in the first plaintiff be sold to them and this was agreed upon by the second plaintiff.

Some years later, it was discovered that the first and second defendants had incorporated the fourth defendant for the purpose of manufacturing similar products as that of the first plaintiff's and the third defendant's for sale to customers of the first and second plaintiffs. It was also alleged that the first and second defendants had disclosed the manufacturing methods and trade secrets of the first plaintiff and the third defendant to the management of the fourth defendant. The first and second defendants had also wrongfully used the first plaintiff's and the third defendant's funds to finance the fourth defendant. An ex parte order was granted restraining the first and second defendants from continuing to manufacture and deal with certain cosmetic and sponge products which closely resembled the first plaintiff's and the third defendant's products. A Mareva injunction was obtained to prevent the first and second defendants from removing from the jurisdiction, dissipating or dealing in any manner whatsoever the assets of the fourth defendant within the jurisdiction. An Anton Piller order was also granted, authorizing the plaintiffs to enter the premises of the fourth defendant to search for articles and/or documents kept in the premises and to inspect them and remove them to the safe keeping of the plaintiffs' solicitors. The defendants now seek to set aside the injunction.

Held, affirming the injunction granted:

(1) The third defendant's name carried with it a semblance of goodwill and good reputation as the company used Japanese technology with high quality control standards coupled with the fact that they have been in the natural rubber products business for more than 25 years in Malaysia. The choice of the fourth defendant's name to enter into the market and manufacture natural rubber and cosmetic sponge products was clearly evidence of the plan by both the first and second defendants to produce and pass-off some of the products manufactured by the fourth defendant as that of the third defendant's products (see p 568B–C).

(2) It was apparent that both the first and second defendants committed breaches of fiduciary duties and trust and it was irrelevant whether the plaintiffs were damnified or have lost profits which they rightly deserved (see p 582D–E).

(3) No words could possibly describe the scheming hatched by the first defendant with the active participation of the second defendant to enrich the fourth defendant at the expense of the third defendant. By diverting business from the third defendant to the fourth defendant, both the first and second defendants had unlawfully used their powers and undermined the third defendant (see p 583G–H).

(4) The first defendant remained as the director of the first plaintiff and the third defendant while the second defendant was the general manager of the first plaintiff and the third defendant. This was a classic case where both the first and second defendants failed to promote the interests of the first plaintiff and the third defendant whose affairs they were conducting. Both of them failed miserably to discharge their fiduciary duties. They entered into engagements which conflict and run counter to their personal interests. As trustees, both these two characters did not act in the best interests of the first plaintiff and the third defendant (see p 584E–F).

(5) To discharge the order of the court in granting the injunction (encl 8) would be disastrous. The plaintiffs would be left with no remedy at all. If all the documents that were seized as a result of the Anton Piller order were returned to the fourth defendant, there would be nothing for the plaintiffs to rely upon at the trial proper. An award of damages would not be an adequate compensation to the plaintiffs even if they were to succeed at the trial in obtaining permanent injunctions. The justice of the case favours the plaintiffs and, consequently, the order in encl 8 should remain till the disposal of the whole suit in a trial proper (see pp 598H–I, 600B).

A [**Bahasa Malaysia summary**

Dalam tahun 1970, plaintif kedua telah memulakan sebuah syarikat pengilangan usahasama di Malaysia dengan berkongsi dengan dua orang warga Malaysia. Bagi tujuan itu, defendan ketiga telah diperbadankan. Lebih kurang setahun selepas defendan ketiga memulakan operasi, kedua-dua warga Malaysia tersebut telah menjual saham-saham mereka kepada defendan pertama dan keluarganya. Dalam bulan Mac 1987, defendan pertama serta adik-beradiknya telah dimaklumkan bahawa plaintif kedua telah memajukan satu span kosmetik dengan pasaran yang berjaya diperolehi di Eropah dan Amerika Syarikat. Sebuah syarikat usaha baru ('plaintif pertama') telah ditubuhkan untuk mengilang span kosmetik yang sedemikian dan defendan ketiga telah digunakan untuk melabur dan memegang 30% dari saham-saham plaintif pertama. Kemudiannya, defendan pertama serta adik-beradiknya meminta supaya saham defendan ketiga dalam plaintif pertama dijual kepada mereka dan ini telah dipersetujui oleh palintif kedua.

Beberapa tahun kemudiannya, telah diketahui bahawa defendan-defendan pertama dan kedua telah memperbadankan defendan keempat bagi tujuan mengilangkan produk yang sama seperti yang dikilangkan oleh plaintif pertama dan defendan ketiga untuk dijual kepada pelanggan-pelanggan plaintif pertama dan kedua. Adalah juga didakwa bahawa defendan-defendan pertama dan kedua telah mendedahkan cara-cara pengilangan dan rahsia perdagangan plaintif pertama dan defendan ketiga kepada pihak pengurusan defendan keempat. Defendan-defendan pertama dan kedua telah juga secara salahnya menggunakan dana plaintif pertama dan defendan ketiga untuk membiayai defendan keempat. Suatu perintah ex parte telah diberikan yang menghalang defendan-defendan pertama dan kedua daripada terus mengilangkan dan berurusan dengan produk-produk kosmetik dan span tertentu yang amat mirip dengan produk-produk plaintif pertama serta defendan ketiga. Suatu injunksi Mareva telah diperolehi bagi menghalang defendan-defendan pertama dan kedua daripada keluar dari bidang kuasa, menghamburkan atau berurusan dengan apa cara sekalipun akan aset-aset defendan keempat di dalam lingkungan bidang kuasa. Satu perintah Anton Pillar telah juga diberikan, yang membenarkan plaintif untuk memasuki premis defendan keempat bagi mencari artikel dan/atau dokumen-dokumen yang disimpan dalam premis tersebut dan memeriksanya serta membawanya keluar untuk disimpan dengan selamat oleh peguamcara plaintif. Defendan-defendan kini cuba untuk mengenepikan injunksi tersebut.

Diputuskan, mengikrarkan injunksi yang diberikan:

(1) Nama defendan ketiga membawa bersamanya suatu persamaan nama baik dan reputasi yang baik kerana syarikat tersebut menggunakan teknologi Jepun dengan piawaian kawalan mutu yang tinggi serta dengan fakta bahawa mereka telah menceburi

dalam perniagaan produk-produk getah asli selama lebih dari 25 tahun di Malaysia. Pilihan nama defendan bagi memasuki pasaran dan pengilangan produk-produk getah asli serta span kosmetik jelas membuktikan rancangan oleh kedua-duanya defendan-defendan pertama dan kedua untuk mengeluarkan dan mengelirupakan sebilangan dari produk-produk yang dikilangkan oleh defendan keempat sebagai produk-produk defendan ketiga (lihat ms 568B–C).

(2) Adalah jelas bahawa defendan-defendan pertama dan kedua telah melakukan kemungkiran kewajipan fidusiari serta amanah dan adalah tidak relevan sama ada plaintif-plaintif telah dikutuk atau telah kehilangan keuntungan yang mana mereka sesungguhnya berhak untuk perolehi (lihat ms 582D–E).

(3) Tiada perkataan yang mungkin boleh menerangkan rencana yang disusun oleh defendan pertama dengan penyertaan aktif defendan kedua bagi memperkayakan defendan keempat sambil merugikan defendan ketiga. Dengan menyimpangkan perniagaan daripada defendan ketiga kepada defendan keempat, kedua-dua defendan-defendan pertama dan kedua telah secara tidak sah di sisi undang-undang menggunakan kuasa-kuasa mereka dan melemahkan defendan ketiga (lihat ms 583G–H).

(4) Defendan pertama telah kekal sebagai pengarah plaintif pertama dan defendan ketiga sedangkan defendan kedua adalah pengurus besar plaintif pertama dan defendan ketiga. Ini adalah satu kes yang klasik di mana kedua-dua defendan-defendan pertama dan kedua gagal untuk mempromosikan kepentingan plaintif pertama dan defendan ketiga yang mana hal-ehwalnya sedang mereka kendalikan. Kedua-dua mereka gagal dengan cara yang mendukacitakan untuk melaksanakan kewajipan fudisiari mereka. Mereka memasuki persetujuan-persetujuan yang bertentangan dengan kepentingan mereka sendiri. Sebagai pemegang amanah, kedua-dua mereka tidak bertindak demi kepentingan plaintif pertama dan defendan ketiga (lihat ms 584D–F).

(5) Perlaksanaan perintah mahkamah memberikan injunksi tersebut (lampiran 8) akan memudaratkan. Plaintif-plaintif tidak lagi mempunyai remedi sama sekali. Jika semua dokumen-dokumen yang dirampas akibat perintah Anton Pillar dikembalikan kepada defendan keempat, tidak akan terdapat apa-apa untuk plaintif-plaintif bergantung pada di perbicaran sebenarnya. Sesuatu award gantirugi tidak akan merupakan pampasan yang cukup kepada plaintif walaupun jika mereka berjaya di perbicaraan bagi memperolehi injunksi tetap. Keadilan kes tersebut memihak kepada plaintif-plaintif dan, akibatnya perintah dalam lampiran 8 harus kekal sehingga penyelesaian keseluruhan guaman tersebut dalam satu perbicaraan yang sempurna (lihat ms 598H–I, 600B).]

A

Notes

For cases on setting aside an injunction, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2339–2341.

Cases referred to

B

Aberdeen Rly Co v Blaikie Bros (1854) 1 Macq 461 (refd)

Anton Piller KG v Manufacturing Processes Ltd & Ors [1976] 1 All ER 779 (refd)

Asia Television Ltd & Anor v Viwa Video Sdn Bhd and connected cases [1984] 2 MLJ 304 (refd)

C

Asian Organization Ltd v White Husdon & Co Ltd [1962] MLJ 139 (refd)

Atwool v Merryweather (1867) LR 5 Eq 464n (refd)

Australian Coal & Shale Employees' Federation v Smith (1937) 38 SR (NSW) 48 (refd)

Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors [1985]

D

2 MLJ 209 (refd)

Bahin v Hughes (1886) 31 Ch D 390 (refd)

Brice v Stokes (1805) 11 Vesp 319 (refd)

Brink's MAT Ltd v Elcombe & Ors [1988] 3 All ER 188 (refd)

Cadbury Schweppes Pty Ltd & Ors v Pub Squash Co Pty Ltd [1981]

E

1 All ER 213 (refd)

Canadian Aero Service Ltd v O'Malley (1973) 40 DLR (3d) 371 (refd)

CBS United Kingdom Ltd v Lambert & Anor [1982] 3 All ER 237 (refd)

Charitable Corp v Sutton (1742) 2 Atk 400 (refd)

Clark v Workman [1920] 1 IR 107 (refd)

Columbia Picture Industries Inc & Ors v Robinson & Ors [1986] 3 All ER

F

338 (refd)

Cook v GS Deeks & Ors [1916] 1 AC 554 (refd)

Dormeuil Freres SA & Anor v Nicolian International (Textiles) Ltd [1988] 3 All ER 197 (refd)

EMI Ltd & Ors v Pandit [1975] 1 All ER 418; [1975] 1 WLR 302 (refd)

G

Ferguson v Wilson (1866) 2 Ch App 77 (refd)

Forest of Dean Coal Mining Co, Re (1878) 10 Ch D 450 (refd)

Foss v Harbottle (1843) 2 Hare 461; 67 ER 189 (refd)

Hamilton v Wright (1842) 9 Cl & Fin 111 (refd)

Hille International Ltd v Tiong Hin Engineering Pte Ltd [1983] 1 MLJ

H

145 (refd)

Imperial Hydropathic Hotel Co, Blackpool v Hampson (1883) 23 Ch D 1 (refd)

Imperial Mercantile Credit Association v Chapman (1871) 19 WR 379

James, Ex p (1803) 8 Ves 337 (refd)

Joint Stock Discount Co v Brown (1869) LR 8 Eq 381 (refd)

I

Land Credit Co of Ireland v Lord Fermoy; ex p Munster (1870) 5 Ch App 323 (refd)

Lian Keow Sdn Bhd v C Paramjothy & Anor [1982] 1 MLJ 217 (refd)

Lim Nyook Yin v Ultratech Sdn Bhd & Anor [1995] 1 MLJ 498 (refd) A
Menier v Hooper's Telegraph Works (1874) 9 Ch App 350 (refd)
Mordecai v Mordecai (1988) 12 NSWLR 58 (refd)
Newcastle-upon-Tyne Marine Insurance Co, Re; ex p Brown (1854) 19 Beav 97 (refd)
Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH Und Co KG ('The Niedersachsen') [1983] 1 WLR 1412 (refd) B
Oceanica Castelana Armadora SA v Mineralimportexport (Barclays Bank International Ltd, Intervening), The Theotokos and other related applications [1983] 2 All ER 65 (refd)
Rank Film Distributors Ltd & Ors v Video Information Centre & Ors [1981] 2 All ER 76 (refd) C
Regal (Hastings) Ltd v Gulliver & Ors [1942] 1 All ER 378 (refd)
Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd [1994] 2 MLJ 770 (refd)
Selangor United Rubber Estates Ltd v Cradock (A bankrupt) & Ors (No 3) [1968] 2 All ER 1073; [1968] 1 WLR 1555 (refd) D
SCF Finance Co Ltd v Masri & Anor [1985] 2 All ER 747 (refd)
Tan Sri Tan Hian Tsin v PP [1979] 1 MLJ 73 (refd)
TDK Tape Distributors (UK) Ltd v Videochoice Ltd & Ors [1985] 3 All ER 345 (refd)
Thermax Ltd v Schott Industrial Glass Ltd [1981] FSR 289 (refd)
Tong Guan Food Products Pte Ltd v Hoe Huat Hng Foodstuff Pte Ltd [1991] 2 MLJ 361 (refd) E
'Vanda', The [1960] MLJ 283 (refd)
Vapormatic Co Ltd v Sparex Ltd & Anor (1976) FSPLR 451 (refd)
Williams v Fawcett [1985] 1 All ER 787 (refd)
York and North Midland Rly v Hudson (1853) 16 Beav 485 (refd) F
Yousif v Salama [1980] 3 All ER 405 (refd)
Yukilon Manufacturing Sdn Bhd & Anor v Wong Gek Meng & Ors (No 3) [1997] 3 CLJ Supp 279 (refd)
Z Ltd v A & Ors [1982] 1 All ER 556 (refd)

G

Legislation referred to

Rules of the High Court 1980 O 45 r 7(4)

M Pathmanathan (*Gan Techiong* with him) (*Gan & Lim*) for the plaintiffs.

Gana Muthusamy (*N Chandran* with him) (*Gana Muthusamy & Co*) for H the defendants.

Abdul Malik Ishak J: By an ex parte summons-in-chambers in encl 6, the plaintiffs sought for the following prayers:

(1) An injunction be issued against the first, second and fourth defendants to restrain each of them, whether by themselves, or by their directors, employees, agents or servants or otherwise howsoever, from doing or in any manner whatsoever from carrying out the following acts: I

A (a) manufacturing, exporting, selling or offering for sale cosmetic sponge products similar to and/or closely resembling the first plaintiff's cosmetic sponge products and/or the third defendant's products, until further order of this honourable court; and

(b) removing from the jurisdiction of this honourable court, dissipating or dealing with in any manner whatsoever, the assets B of the fourth defendant situated within the jurisdiction of this honourable court, including but not limited to, monies in the bank account or accounts of the fourth defendant, until further order of this honourable court;

(2) No bank shall be prevented by an order of this honourable court from exercising any rights of set-off which it may have acquired prior to the C date of the order;

(3) The first and second defendants, whether by themselves or by their agents or employees, to surrender to the second plaintiff or its lawful representatives for preservation until trial or further order of this honourable court, all account books, bank statements from 1990 to 1996, ledgers, cash books, and other financial documents of the third D defendant, Supertex Industries Sdn Bhd and to allow the second plaintiff and its representatives to examine, to take photographs and/or to make photocopies of the documents mentioned above;

(4) The first, second and fourth defendants, whether by themselves, employees, agents or servants or other persons who appear to have control of the premises known as 85L–5, No 1 & 2, Batu $1^1/_2$, Jalan E Tampoi, 81200 Johor Bahru, to permit the plaintiffs' solicitors and a few others (not exceeding six (6) persons), and other officers of this honourable court (if present), to enter into the premises mentioned above and any part of the said premises, between 8 am and 7 pm, for the following purpose(s):

F (a) to examine the documents in the said premises, including those kept in drawers and locked places, and to remove from the said premises, to be kept by the plaintiffs' solicitors, for the purpose of preserving evidence until trial or further order, all documents which originated from or concern the first plaintiff, second plaintiff, third defendant and/or their customers; and

G (b) to take photographs of the machinery, moulds, and work in progress and also finished goods which are similar to and/or closely resembling the plaintiffs' and the third defendant's products;

(5) The plaintiffs be allowed to use the information, documents and photographs obtained pursuant to the order as evidence against the defendants;

H (6) The injunction issued as stated in para (1) above shall lapse after a period of two (2) weeks from the date of the order, if not earlier;

(7) The plaintiffs' application be fixed for hearing inter partes on the fourteenth (14) day from the date of the ex parte hearing or on such other date which may be fixed by this honourable court;

I (8) The costs and incidental expenses of the plaintiffs' application be costs in the cause; and

(9) Other relief and order deemed fit by this honourable court.

After hearing the submissions of Mr Gan Techiong, the learned counsel for the plaintiffs, I granted, on 8 January 1997, the prayers in paras (1)(a) and (b), (2), (3), (4) (a) and (b), (5) and (8) of encl 6. The inter partes hearing was then fixed on 21 January 1997. The headnote to the case of *Lim Nyook Yin v Ultratech Sdn Bhd & Anor* [1995] 1 MLJ 498, which was also reported in the All Malaysia Reports, vide [1995] 1 AMR 183, bears repetition:

> Time is mandatorily set out in O 29 r 1(2B) of the RHC and the court has no power to extend it. Thus, an interim injunction granted ex parte would lapse after two weeks in the absence of any application to revoke it or set it aside. The words 'unless sooner revoked or set aside' in O 29 r 1(2B) of the RHC by itself gave the court power to set a return date for an inter partes hearing. This is the best way for the defendants to revoke or set aside the ex parte interim injunction before the expiry of two weeks. At the inter partes hearing, the ex parte interim injunction may be extended under O 92 r 4 until disposal of the suit.

The plaintiffs wasted no time and extracted the order handed down by this court on 8 January 1997, as reflected in encl 8. There was, incorporated in that injunction order, a penal notice under O 45 r 7(4) of the Rules of the High Court 1980 ('the RHC'). That penal notice was worded thus:

> *Indorsement pursuant to O 45 r 7(4) Rules of the High Court 1980*
>
> If the first defendant Wong Gek Meng, second defendant Wong Geok Cheong, and fourth defendant Supertex MFG Sdn Bhd disobey this order, you Wong Gek Meng (I/C No 3534112), director of Supertex MFG Sdn Bhd, and Wong Geok Cheong (I/C No 23106766) will be liable to the process of execution for the purpose of compelling the defendants to obey the same.
>
> Sgd (Illegible)
>
> Senior Assistant
> Deputy Registrar,
> High Court of Malaya,
> Johor Bahru

In extracting the order, as per encl 8, Messrs Gan & Lim, Advocates & Solicitors, rightly incorporated the penal notice. It is not a matter of the discretion of the court or of the solicitors who extract the order to incorporate that penal notice. Donaldson MR rightly described the penal notice in *Williams v Fawcett* [1985] 1 All ER 787 at p 789, in these words:

> It must be issued at the time when the order or judgment is drawn up if that order is in the nature of an injunction ... .

Different penal notices should be used in cases of mandatory and prohibitory orders and also in a case where the order is against an individual or a corporation. In the case of an order against a company or a corporation, the penal notice must be specific and should name all the directors and officers of the company or corporation and that order should be served on each and every person named in the penal notice. The value of a penal notice cannot be doubted. A classical example would be the case of *'The Vanda'* [1960] MLJ 283, where the plaintiff obtained an order against the

defendants, requiring the latter to file an affidavit within the prescribed time. The order was duly served on the defendants but unfortunately the order did not contain the penal notice. In due course, the defendants filed an affidavit which the plaintiff claimed did not comply with the order. The plaintiff held onto the notion and argued that the defendants were in contempt of court. The Court of Appeal, however, decided not to enforce the order since the order did not contain any penal notice.

Reverting back to the issue at hand, encl 6 was supported by two affidavits. One affidavit was affirmed by Mitsuhiko Sakamoto on 7 January 1997, as reflected in encl 5a, while the other affidavit was affirmed by Makoto Togase on 7 January 1997, and can be seen in encl 5. Enclosure 5a showed Mitsuhiko Sakamoto as the director of the first plaintiff, a company that operated a factory at Lot 71, No 80, Jalan Tampoi, 81200 Johor Bahru. Incidentally, Mitsuhiko Sakamoto too was said to be the president of the second plaintiff, a company which was incorporated in Japan and had its office at 17–32, Omori-Mohi, 2 Chome Ota-Ku, Tokyo 143, Japan. The second plaintiff was said to have been incorporated in Japan in 1952 and was engaged in the technological development of latex foam industry for more than forty (40) years. Mitsuhiko Sakamoto deposed in encl 5a that he was duly authorized by the first and second plaintiffs to affirm the affidavit in support of the application for an injunction and other related orders against the defendants. This was what Mitsuhiko Sakamoto deposed in his affidavit in encl 5a.

Historically, it was said that the second plaintiff's relationship with the first defendant — one Dato' Wong Gek Meng ('Dato' Wong') went as far back as 25 years ago. In 1970, two Malaysians by the names of Hiap Seng Kee @ Yap Seng Kee and Yap Sing Hock ('the Yap brothers'), agreed to start a joint venture manufacturing company in Malaysia, by teaming up with the second plaintiff. At that time, Mitsuhiko Sakamoto's late father was the president of the second plaintiff and the old man agreed to provide the technology and the necessary staff training. For that purpose, the third defendant — Supertex Industries Sdn Bhd, was incorporated as a manufacturing company to manufacture natural rubber products. The Yap brothers were taught well. They were trained at the second plantiff's factory in Japan for several months. Somehow, about a year after the third defendant's factory started operations in Johor Bahru, the Yap brothers sold their shares to Dato' Wong and his family. This spelt trouble. The shareholding structures of the third defendant at the present time can be itemized as follows:

(1) Dato' Wong holding 264,000 shares;

(2) Ong Gek Ching @ Wong Gek Ching held 46,500 shares; and

(3) The second plaintiff — Yukigaya Chemical Industry Co Ltd held 279,000 shares.

Ong Gek Ching @ Wong Gek Ching is the younger brother of Dato' Wong and together they held 52.67% stake in the third defendant as compared to the second plaintiff's stake of 47.33% in the third defendant. It was deposed

that Ong Gek Ching @ Wong Gek Ching now resides in Australia and his shareholding in the third defendant was held and controlled by Dato' Wong. As the latter held 52.67% shares in the third defendant, it was practically impossible for the third defendant to pass a resolution to sue Dato' Wong and his other brother by the name of Wong Geok Cheong — the second defendant. It was said that the second plaintiff, as a minority shareholder of the third defendant, was compelled to sue Dato' Wong, Wong Geok Cheong and the fourth defendant on behalf of the third defendant. Mitsuhiko Sakamoto was verily advised that to institute a derivative action of this kind, the third defendant had to be named as a defendant to ensure that the judgment of this court would bind them. In *Yukilon Manufacturing Sdn Bhd & Anor v Wong Gek Meng & Ors (No 3)* [1997] 3 CLJ Supp 279 at p 287, I said en passant:

> Derivative action is a difficult branch of the law. The action is derivative when the person who brings the action rely, not on a cause of action belonging to him personally, but one belonging to another person. This is the simplest mode of explaining what is a derivative action. It is a cause of action and it is an exception to the principle that one person cannot, in general, sue to obtain relief of another person who has been injured by a wrongdoer. In company law, a derivative action is one brought by a member or members based on a cause of action vested in the company alone rather than a cause of action belonging to the plaintiff or plaintiffs personally (*Maas v Mc Intosh* (1928) 28 SR (NSW) 441; *Hooker Investments Pty Ltd v Email Ltd* (1986) 10 ACLR 443).

It was deposed further in encl 5a that as the third defendant has been in the natural rubber products business in Malaysia for more than 25 years, the third defendant's name 'Supertex' carried with it goodwill and reputable reputation as a company which used Japanese technology of high quality control standards. It was deposed that the first plaintiff was incorporated in Malaysia on 29 June 1987 and that Mitsuhiko Sakamoto was instrumental in the incorporation of the first plaintiff. It seemed that Mitsuhiko Sakamoto had informed Dato' Wong and his brothers sometime in March 1987 to the effect that the second plaintiff had developed a cosmetic sponge used as cosmetic powder puffs and applicators with a successful market in Europe and the United States for world renowned cosmetic manufacturers, including Revlon, Chanel, Borghese, Avon, Estee Lauder and Christian Dior. It was deposed that at the initial stage, Dato' Wong and his brothers were apprehensive about starting a new joint-venture company to manufacture cosmetic sponge products and they proposed that the third defendant be used to invest and hold 30% of the shares in the first plaintiff. Later, when Dato' Wong discovered that the first plaintiff was raking in profits and generated huge profits, Dato' Wong and his brothers requested that the third defendant's shares in the first plaintiff be sold to them at par value of RM1 per share. The second plaintiff graciously agreed to the request. The overall shareholding would be as follows. The second plaintiff holds approximately 51% of the shares in the first plaintiff. Dato' Wong and his family members held approximately 30%, while the remaining 19% was held by a Japanese customer. All along, the second plaintiff was the sole

overseas sales agent for the third defendant. It was mutually agreed that the second plaintiff would serve as the first plaintiff's agent and this was clearly reflected in the minutes of the meeting dated 18 March 1987, which was exhibited and marked as 'MS2'. The second plaintiff was magnanimous in that it gave technical training to the staff of the first plaintiff and the third defendant in Malaysia. Several of the staffs were also sent to the second plaintiff's factory in Japan for training. It was quite apparent that both Dato' Wong and Wong Geok Cheong had no technical knowledge about manufacturing and, consequently, all the production technology came directly from the second plaintiff. All the moulds used by the first plaintiff and the third defendant were supplied by the second plantiff. Over the years, a few moulds invariably had been transferred to the first plaintiff and the third defendant, but the majority of those moulds remained the property of the second plaintiff — on the understanding that they were meant for loan for use in Malaysia. This fact was confirmed in a letter dated 12 January 1990, emanating from the third defendant to the second plaintiff and signed by Wong Geok Cheong. It seemed that the first plaintiff and the third defendant shared a factory premise at Lot 71, No 80, Jalan Tampoi, 81200 Johor Bahru, and it was agreed that the third defendant would supply foam rubber to the first plaintiff. Put bluntly, the foaming process of products manufactured by the first plaintiff was carried out by the third defendant and paid for by the first plaintiff. This was in the nature of a joint-venture manufacturing contract that was clearly pleaded in the statement of claim and that joint-venture had been in operation since 1987/1988.

The second plaintiff took the necessary steps and seconded their staff to work for the first plaintiff in Malaysia. At all material times, Makoto Togase, who hailed from Japan, served as the factory manager for the first plaintiff in Malaysia and he put long hours to supervise the manufacturing processes. Wong Geok Cheong who was, at all material times, the general manager of the first plaintiff and the third defendant, did not go to the companies' office regularly. It was said that Wong Geok Cheong was in charge of employment of workers, accounts, financial matters and the purchase of raw materials. Wong Geok Cheong drew a monthly salary of RM2,000 from the first plaintiff and RM2,500 per month from the third defendant — this state of affairs prevailed at all material times.

Mitsuhiko Sakamoto deposed that he fully trusted Dato' Wong and Wong Geok Cheong. It was because of this attitude of trustworthiness that a compromise was made in regard to the signing of the cheques. Thus, the cheques of the first plaintiff and the third defendant respectively had to be signed by either the first or the second defendant and Mitsuhiko Sakamoto. However, since the latter only visited Malaysia about once in every three months, he, Mitsuhiko Sakamoto, decided to sign the cheques in the cheque books blank as it were, and fully trusted Dato' Wong and Wong Geok Cheong to fill in the name of the payee before either of them signs, to make the necessary payments to the respective companies. Initially, the arrangement went on smoothly, but over a period of a few months in 1996, Mitsuhiko Sakamoto discovered, to his shock and dismay, the following unhappy state of affairs:

(1) that Dato' Wong and Wong Geok Cheong had, on the sly, incorporated a new company known as Supertex Mfg Sdn Bhd ('the fourth defendant') on 21 June 1995, for the purpose of manufacturing similar products as that of the first plaintiff's and the third defendant's, for sale to the customers of the first and second plaintiffs with that of the third defendant; A

(2) that both Dato' Wong and Wong Geok Cheong disclosed the manufacturing methods and trade secrets of the first plaintiff and the third defendant to the management of the fourth defendant; this scheming was to enable the fourth defendant to manufacture products similar to the first plaintiff's and the third defendant's products; B

(3) that Dato' Wong disclosed the specifications of the first plaintiff's and the third defendant's products to the fourth defendant to enable the latter to enter the open market and sell the products to the customers; C

(4) that Dato' Wong and Wong Geok Cheong, with their agents, stooped so low as to steal moulds belonging to the first and second plaintiffs and the third defendant, and later moved and transferred those moulds to the fourth defendant's premises at 85–L–5, No 1–2, Jalan Tampoi, 81200 Johor Bahru; this exercise was simply to enable the fourth defendant to copy and use those moulds; D

(5) that both Dato' Wong and Wong Geok Cheong unlawfully utilized the funds of the first plaintiff for their personal gain — acts which tantamount to a breach of trust in regard to the first plaintiff and the third defendant; E

(6) that Wong Geok Cheong had encouraged and caused the employees of the first plaintiff and the third defendant to leave their employment in order to work for the fourth defendant. Naturally, this caused serious manpower problems for not only the first plaintiff but also the third defendant; the problem became insurmountable and it disrupted productions; and F

(7) that Dato' Wong had the audacity to conceal all the above facts from the plaintiffs' knowledge, and by foul means, attempted to cover up his wrong doings by persuading the second plaintiff to exchange its shares in the third defendant for his shares in the first plaintiff; it was a swapping exercise and Dato' Wong conveniently described it as a 'share exchange exercise'. G

Mitsuhiko Sakamoto deposed that the proposed 'share exchange exercise', which was supposed to be completed on 29 March 1996, led him to check the account books, records and company documents of both the first plaintiff and the third defendant. It was in the course of this checking that Mitsuhiko Sakamoto uncovered several serious discrepancies but, unfortunately, Wong Geok Cheong failed to explain those irregularities. This prompted Mitsuhiko Sakamoto to write a letter to Dato' Wong dated 28 March 1996. That letter makes for interesting reading and it was worded thus (as seen at exh 'MS4' of encl 5a): H I

M Sakamoto,
President,
Yukigaya Chemical Industry Co Ltd,
2–17–32, Omari-Nishi, Ota-Ku,
Tokyo, Japan.

28 March 1996

Dato' Wong Gek Meng,
c/o Hock Lee Motor Credit Sdn Bhd,
30, Jalan Harimau Tarum,
Century Garden,
80250 Johor Bahru

Fax & Registered Post

Dear Sir,

Re: Yukilon Manufacturing Sdn Bhd and Supertex Industries Sdn Bhd

I refer to my meeting with your brother, Mr Wong Geok Cheong, at the factory at Lot 71, No 80, Jalan Tampoi, 81200 Johor Bahru on 26 and 27 March 1996. On the 26 March 1996, I inspected the machinery which Yukilon Manufacturing Sdn Bhd has agreed to purchase from Supertex Industries Sdn Bhd. On the 27 March 1996, I inspected the company books and documents of Yukilon. My lawyer, Mr Gan Techiong, was with me for about two hours in the morning to explain to me the law about EPF, SOCSO and the Factories and Machineries Department. In the afternoon (27 March 1996), I looked at the recent bank statements and cheque book of Yukilon. Your brother, Mr Wong Geok Cheong, promised to meet me again at the factory at 10 am today, but he did not come. I waited for him till lunch time.

I am writing to you because I am concerned about the things which I found from looking at the documents and cheque book of Yukilon. I have trusted you and your brothers for the past 24 years. I have always signed Yukilon and Supertex Industries cheque books blank, and allowed you to fill in the name of the person to pay and also the amount. I have never questioned you before.

I was concerned to find that Supertex Industries journals show three cheques totalling RM770,000, for Yukilon to pay Supertex Industries this year. This is a big sum. This morning I waited for your brother, Wong Geok Cheong, who is the General Manager, to ask him but he didn't come.

I have also found other things which show that the two companies' matters are not proper. I must check further before completing share exchange exercise since I am still a director, and represent major shareholders of Yukilon and also Supertex Industries.

I therefore cancel the share exchange exercise fixed for tomorrow, 29 March 1996. I shall write to you again.

Yours faithfully,

Sgd (Illegible)
M Sakamoto,
President,
Yukigaya Chemical Industry Co Ltd

By a letter dated 12 April 1996, the second plaintiff conveyed the message to Dato' Wong to the effect that the share exchange exercise should be cancelled. That letter was worded thus (see exh 'MS5' of encl 5a):

Yukigaya Chemical Industry Co Ltd,
2-17-32, Omorinishi, Otaku, Tokyo, Japan
Tel: 81–3–3761–1445 Fax: 81–3–3768–0469

12 April 1996

Dato' Wong Gek Meng,
c/o Hock Lee Motor Credit Sdn Bhd,
30, Jalan Harimau Tarum,
Century Garden,
80250 Johor Bahru.

Fax & Registered Post
Urgent

Dear Sir,

Re: Yukilon Manufacturing Sdn Bhd and Supertex Industries Sdn Bhd

I refer to your a letter, dated 9 April 1996, and to my earlier letter to you, dated 28 March 1996.

The payment of RM235,000 which we made on behalf of Yukilon Manufacturing Sdn Bhd to Supertex Industries Sdn Bhd was for the agreed purchase of the machinery mentioned in the short agreement which you prepared on 14 February 1996. In fact, the new licenses issued to Yukilon Manufacturing Sdn Bhd are in your possession now, since you took them from Mr Makoto Togase last month.

The purchase of the machinery is just simple transaction between Yukilon Manufacturing Sdn Bhd and Supertex Industries Sdn Bhd. It is a separate matter from our share exchange exercise.

As you are aware, the police have found the stolen aluminium moulds in the factory of Supertex Manufacturing Sdn Bhd. We are very disappointed that you started a new factory without our knowledge, and you used the stolen moulds for production at your secret factory.

I believe you are also aware that money belonging to our companies have been used by your brother for private purposes. I discovered this only on my last trip to Malaysia and my directors at Yukigaya are very disappointed with you because I trusted you so much that I signed blank cheques for many years.

I therefore give you notice that our share exchange exercise must be cancelled. There are too many things which you did not disclose to me. We must investigate with the assistance of the police.

Yours faithfully,

Sgd (Illegible)
Yukigaya Chemical Industry Co Ltd,
M Sakamoto,
President.

cc: Mr Gan Techiong,
Gan & Lim,
Advocates & Solicitors.

Mitsuhiko Sakamoto deposed that he, together with Makoto Togase, made random checks in the factory premises and discovered that more than 60 aluminium moulds belonging to the plaintiffs were missing. Golf ball moulds belonging to the second plaintiff also went missing. Both of them were told by some of the workers that:

(a) Wong Geok Cheong, the recalcitrant general manager, was seen removing moulds from the factory premises after office hours a few months earlier; and

(b) both Dato' Wong and Wong Geok Cheong had started a 'new Supertex factory' in Tampoi, namely, the fourth defendant.

Mitsuhiko Sakamoto deposed that he investigated and discovered that it was Dato' Wong that started the fourth defendant. Arising out of that, Makoto Togase lodged a police report on 2 April 1996, which activated the police to swiftly raid the fourth defendant's premises. This resulted in the recovery of the stolen moulds. Mitsuhiko Sakamoto was quite categorical when he deposed that the police was still investigating the case. He took no chances and managed to convince the two workers who witnessed the thefts on separate occasions to swear a statutory declaration each to that effect. This was done as can be seen in exh 'MS6', which showed the statutory declaration of Rapingah bte Awang that was sworn on 31 October 1996, and exh 'MS7' which, likewise, showed the statutory declaration of Shah Alam Shahid Patwary that was sworn on 7 December 1996.

It was Mitsuhiko Sakamoto's stand that both Dato' Wong and Wong Geok Cheong resorted to stealing the moulds that belonged to the first and the second plaintiffs as well as the third defendant for the simple reason that both these two personalities knew that they (referring to the first and the second plaintiffs as well as the third defendant) were the only manufacturers of cosmetic sponge products in Malaysia. Both Dato' Wong and Wong Geok Cheong knew that the moulds used by these companies have been proven to be accurate and of good quality. As an easy way out to start their own factory, stealing the moulds was the best way to achieve their goal. It was deposed that the following considerations were taken into account when both Dato' Wong and Wong Geok Cheong decided to steal the moulds:

(1) It is a very expensive affair to make aluminium moulds that are accurate in dimension for the purpose of producing fine products like cosmetic sponges; to enable this to be done, a master mould must be designed and this requires expertise.

(2) It is certainly easier to steal an aluminium mould which had been tested and used, rather than to make a replica by reference to the original and its drawings.

(3) It is necessary and a necessity to have a large number of moulds to test their new machinery.

Mitsuhiko Sakamoto deposed that he began examining the bank statements of the first plaintiff and the third defendant with a toothcomb and he

discovered, to his dismay, that both Dato' Wong and Wong Geok Cheong, had been misappropriating monies belonging to the first plaintiff and the third defendant. The trust which Mitsuhiko Sakamoto reposed in both Dato' Wong and Wong Geok Cheong for more than 23 years, as demonstrated by signing blank cheques, came to nought when the very foundation of that trust crumbled down like a deck of playing cards. Mitsuhiko Sakamoto had assumed, all these years, that both Dato' Wong and Wong Geok Cheong were trustworthy. Mitsuhiko Sakamoto wrote to the Pacific Bank Bhd and enquired as to the account of the first plaintiff but the said bank refused to divulge any information notwithstanding the fact that he was a co-signatory in operating the account. Mitsuhiko Sakamoto gained some grounds when United Malayan Banking Corp Bhd ('UMBC') cooperated and provided a few photocopies of the cheques issued from the first plaintiff's account. It was shocking to discover that both Dato' Wong and Wong Geok Cheong had wittingly used the first plaintiff's funds to pay Hamid & Chua Securities Sdn Bhd, a stock broking firm (now known as Peninsular Securities Sdn Bhd). Three cheques were issued for the purchase of public listed shares in favour of Dato' Wong and Wong Geok Cheong and these cheques were exhibited in encl 5a as:

(a) UMBC cheque No 665149 for RM46,216.75;

(b) UMBC cheque No 665172 for RM15,587.30; and

(c) UMBC cheque No 665195 for RM117,000.

These cheques must be the tip of the iceberg as Mitsuhiko Sakamoto was unable to quantify the exact and precise amount of money that has been misappropriated by both Dato' Wong and Wong Geok Cheong. All the same, it was deposed that these two personalities have used the first plaintiff's and the third defendant's funds to finance the fourth defendant. It was deposed that consultations were made with an officer from the commercial crime division of the Johor police and a special audit was advised to be carried out on the first plaintiff and the third defendant. It was with some difficulty but finally, the second plaintiff managed to pass a resolution enabling the first plaintiff to carry out that special audit check. For obvious reasons, Dato' Wong opposed that resolution but he did not attend the EGM which was, in any event, postponed twice. A copy of the notice of the EGM was marked as exh 'MS11' of encl 5a and for convenience it is reproduced hereinunder:

Yukilon Manufacturing Sdn Bhd
(Incorporated in Malaysia)

Registered Office: 28B, Jalan Abiad Satu,
Taman Pelangi,
80400 Johor Bahru.

Notice of Extraordinary General Meeting

Pursuant to the requisition for an extraordinary general meeting dated 29 June 1996, and s 144(3) of the Companies Act 1965, notice is hereby given that an extraordinary general meeting of the company scheduled to be held on Thursday, 8 August 1996, at 3 pm, adjourned to Friday, 23 August 1996, at

A 3 pm, be now further adjourned to Tuesday, 17 September 1996 at 9.30 am at 28B, Jalan Abiad Satu, Taman Pelangi, 80400 Johor Bahru to consider, and if thought fit, to pass the resolutions as set forth below:

(1) in the light of the recent discovery of misappropriation of funds belonging to the company, a firm of external auditors be appointed to carry out special audit of the company's accounts covering the previous five
B financial years; and

(2) Mr Makoto Togase be appointed a director of the company to represent the interest of Yukigaya Chemical Industry Co Ltd.

By order of the said requisitionist as provided by the said Act

C Sgd (Illegible)
Chong Kang Yin
Secretary

Johor Bahru
Dated: 27 August 1996

D Note: A member of the company entitled to appoint a proxy to attend and vote instead of him. No person shall be appointed a proxy unless he is a member of the company or a person approved in writing by the directors.

The instrument appointing a proxy must be lodged at the registered
E office not less than 48 hours before the time appointed for holding the meeting.

Since the third defendant was controlled by Dato' Wong, it was practically impossible to pass a resolution to carry out a special audit. All the ledgers, old cheque books, bank statements etc, had been removed by both Dato' Wong and Wong Geok Cheong clandestinely and these documents were
F believed to be kept at the premises of the fourth defendant. For these reasons, Mitsuhiko Sakamoto added a prayer that both Dato' Wong and Wong Geok Cheong be ordered to produce these documents so as to stop them from destroying the evidence of their likely involvement in a breach of trust. It was deposed that representations were made to the Registrar of
G companies in 1995, to highlight the fact that the similarity in the name of the fourth defendant with that of the third defendant was confusing and, consequently, the fourth defendant should not have been registered at all. In short, the true facts were not represented to the Registrar of companies before the fourth defendant was duly registered as such. All the documentary evidences showed that Dato' Wong was instrumental in
H incorporating the fourth defendant and reference to some of them would suffice:

(i) Statutory declaration affirmed by Dato' Wong on 27 May 1995 to incorporate the fourth defendant (see exh 'MS12' of encl 5a).

(ii) Form 49 emanating from the fourth defendant that was lodged with
I the Registrar of Companies dated 29 June 1995, that clearly showed Dato' Wong as the director of the fourth defendant (see exh 'MS13' of encl 5a).

(iii) Form 24 dated 29 June 1995, showing Dato' Wong and his son, Wong Yong Seng, holding one share each of the fourth defendant (see exh 'MS14' of encl 5a).

(iv) Form 24 dated 9 December 1995, showing Dato' Wong, Wong Geok Cheong and their niece, holding jointly more than 51% of shares in the fourth defendant (see exh 'MS15' of encl 5a).

Without a doubt, the third defendant's name carried with it a semblance of goodwill and good reputation, as the company used Japanese technology with high quality control standards coupled with the fact that they have been in the natural rubber products business for more than 25 years in Malaysia. The choice of the fourth defendant's name to enter into the market and manufacture natural rubber and cosmetic sponge products was clearly evidence of the plan by both Dato' Wong and Wong Geok Cheong to produce and pass-off some of the products manufactured by the fourth defendant as that of the third defendant's products. Flowing from this, Mitsuhiko Sakamoto believed that there was clearly a breach of fiduciary duties on the part of Dato' Wong and Wong Geok Cheong as director and general manager, respectively, of the third defendant. It was fortunate for Mitsuhiko Sakamoto to be privy to certain documents transmitted to him by a good samaritan for the simple reason that the second plaintiff received photocopies of documents that clearly showed that both Dato' Wong and Wong Geok Cheong used the fourth defendant to sell its products to the customers of the plaintiffs and the third defendant. That good samaritan transmitted the following documents to the second plaintiff that told a tale of its own:

(a) A copy of the third defendant's invoice dated 22 March 1996, to Yingkou Sanki Manufacturing Inc in China, for the sale of latex sponge rods at Japanese Yen two million seven hundred thousand (see exh 'MS16' of encl 5a).

(b) A copy of the fourth defendant's invoice dated 6 April 1996, showing the sale of latex sponge rods to the third defendant's customer by the name of Yingkou Sanki Manufacturing Inc in China, at Japanese Yen two million two hundred eighty-nine thousand six hundred (see exh 'MS17' of encl 5a).

(c) A copy of the fourth defendant's invoice dated 6 April 1996, showing sale of NR sponge for clinique to Tokyo Puff Co Ltd in Japan, a customer of the first plaintiff at Japanese Yen one million seven hundred forty thousand (see exh 'MS18' of encl 5a).

(d) A copy of the fourth defendant's invoice dated 8 May 1996, showing the sale of NR sponge clinique to Tokyo Puff Co Ltd in Japan, again a customer of the first plaintiff at Japanese Yen two million eighty thousand (see exh 'MS19' of encl 5a).

Interestingly, the second plaintiff also received documents which prove that both Dato' Wong and Wong Geok Cheong had used the fourth defendant to manufacture similar products and sold them to the first and second plaintiffs' customers by the name of Kabushiki Kaisha Elumo in Japan at approximately RM225,000.

A It was deposed that both Dato' Wong and Wong Geok Cheong instigated and caused the workers of the first plaintiff and the third defendant to resign and work with the fourth defendant. Mitsuhiko Sakamoto investigated and found, to his dismay, that the following workers, formerly with the first plaintiff, were told by Wong Geok Cheong to work for the fourth defendant:

B

(a) Kan Mooi (f) — a former clerk in charge of preparation of shipping documents;

(b) Suzita bte Hussin;

(c) Normala bte Mohd Noor;

C (d) Md Loni Miah;

(e) Jasim Uddin;

(f) Hanum bte Daim;

(g) Abdul Motaleb; and

D (h) Md Khasry Litoh.

Several key personnel and employees of the third defendant were also made to work for the fourth defendant and their names were as follows:

(1) Lee Gek Peng, a former production manager and was trained by the second plaintiff in Tokyo;

E (2) Tan Boon Teck, formerly an assistant production manager;

(3) Oh Ah Moi;

(4) Oh Cheng Hiok;

(5) Tan Kok Hwee;

F (6) Rumini bte Ahmad;

(7) Hanim bte Mohd;

(8) Mazenah bte Hassan;

(9) Chai Ah Loi;

(10) Mah bte Bakar;

G (11) Md Anisre Rahman;

(12) Summiya bte Suma;

(13) Mohamed Abdul Hasan;

(14) Ahmad Ali;

H (15) Sheikh Farid; and

(16) Abul Hashem.

It was deposed in strong language that both Dato' Wong and Wong Geok Cheong had deliberately disrupted the production of the first plaintiff and the third defendant by causing a mass resignation of the workers to leave

I and work for the fourth defendant. To add insult to injury, the diversion of business to the fourth defendant had unduly caused the first plaintiff to suffer serious loss of production and sales in 1996. It was solemnly deposed

that the total profit before taxation for the same period dropped 64% from RM1,054,048 to RM376,106.53. It seemed that the loss suffered by the third defendant was colossal as both Dato' Wong and Wong Geok Cheong used their majority powers to pass a resolution to stop all production businesses of the third defendant in June 1996. Even though Mitsuhiko Sakamoto, on behalf of the second plaintiff who held 47.33%, objected to the passing of that resolution, yet Dato' Wong insisted in proceeding ahead with the resolution to stop the production line of the third defendant. It was deposed that the purpose for doing this was to divert all the third defendant's business to the fourth defendant. It was deposed that there was no necessity in stopping the third defendant's manufacturing operation because it was a profit making venture which raked profits of RM624,975 for the financial year of 1995.

Both Dato' Wong and Wong Geok Cheong had, on 12 September 1996, proceeded to the first plaintiff's factory premises with several lorries and workers from the fourth defendant. Initially, Makoto Togase, as the first plaintiff's factory manager, refused to let them in. But as both Dato' Wong and Wong Geok Cheong became very aggressive and abusive, Makoto Togase relented principally because he feared for his safety. The factory gates were unlocked to let them in. This enabled Dato' Wong and Wong Geok Cheong to remove machineries belonging to the third defendant and also the moulds belonging to the plaintiffs. They failed to prepare an inventory list of the items taken by them.

Mitsuhiko Sakamoto threatened to lodge a police report against Dato' Wong. This prompted the latter to order Wong Geok Cheong to return some of the moulds on 23 September 1996. Since the production line of the first plaintiff was seriously disrupted, Mitsuhiko Sakamoto agreed to Dato' Wong's proposal that the first plaintiff purchased a few machineries from the third defendant.

Sometime in February 1996, Makoto Togase saw Wong Geok Cheong took out from the first plaintiff's office stacks of order sheets sent by the second plaintiff to the first plaintiff. Makoto Togase did not question Wong Geok Cheong in regard to his conduct simply because the latter was the first plaintiff's general manager. It was deposed that these order sheets were kept at the fourth defendant's premises for their reference when they manufacture samples to offer to the customers of the first plaintiff. These order sheets were invaluable as they contain vital and confidential information pertaining to the:

(1) details of products, size, thickness, colour and hardness factor;

(2) unit price;

(3) packaging condition;

(4) delivery date and destination;

(5) shipping documentary requirements including GSP forms and invoices; and

(6) price transacted.

It was deposed that Dato' Wong and Wong Geok Cheong must have taken photographs of the layout of the first plaintiff's machineries and moulds particularly the drawings of those moulds and the records of the manufacturing processes. All these would enable them to quickly start the fourth defendant into operation. These surmises were made after taking into account the fact that the first plaintiff was the one and only manufacturer of cosmetic sponge products in Malaysia and there was nowhere else where both Dato' Wong and Wong Geok Cheong could have obtained that information.

It was categorically deposed that the production techniques employed by the fourth defendant were copied from the first and second plaintiffs for the simple reason that there was no other cosmetic sponge manufacturer in the world that used aluminium moulds measuring 900 mm or 922 mm in length. The second plaintiff was quite advanced as they had a full time research and development department in Tokyo, Japan, which developed the special technique and formula for long aluminium moulds to be used. It seemed that there was only one cosmetic sponge manufacturer in Taiwan, Korea and Thailand respectively and each of them use moulds of about 500 mm to 700 mm in length. In Europe and the USA, aluminium moulds were not used at all as they preferred sheet moulds.

The plaintiffs feared that both Dato' Wong and Wong Geok Cheong would hide or destroy the following items and articles:

(1) the order sheets adverted to earlier;

(2) the stolen moulds;

(3) the mould drawings and other documents that were stolen;

(4) germane and pertinent evidence to show that they had misappropriated the companies' funds; and

(5) photographs and records of manufacturing processes which were taken or copied from both the plaintiffs.

For the foregoing reasons, and in the interest of justice, the plaintiffs sought to injunct by restraining Dato' Wong, Wong Geok Cheong and the fourth defendant from continuing to manufacture and offer for sale cosmetic sponge products and other products similar to or resembling the first plaintiff and/or the third defendant's products for otherwise, the continuing damage caused was said to be irreparable. It was the plaintiffs' stand that both Dato' Wong and Wong Geok Cheong have committed breaches of trust and had profited from the wrongful setting-up of the fourth defendant and they both must be restrained from dissipating the assets and profits of the fourth defendant. Further, it was also the plaintiffs' stand that for the sake of preserving crucial evidence, both Dato' Wong and Wong Geok Cheong and the fourth defendant be compelled to allow the plaintiffs' solicitors and representatives to search the fourth defendant's premises at 85–L–5 No 1 & 2, Jalan Tampoi, 81200 Johor Bahru. The plaintiffs too gave an undertaking as to damages and they are said to be worth more than RM80 million in net assets.

As I said, Makoto Togase affirmed an affidavit on 7 January 1997, as reflected in encl 5 in support of encl 6. Makoto Togase deposed that he was currently the factory manager of the first plaintiff and that he was appointed as a director of the first plaintiff sometime in September 1996. Makoto Togase categorically affirmed that all the matters deposed by him were true and within his personal knowledge unless otherwise stated. Makoto Togase had read the affidavit of Mitsuhiko Sakamoto in encl 5a and he confirmed all the events mentioned therein (in regard to encl 5a). Makoto Togase was more categorical when he confirmed that he saw Wong Geok Cheong took out from the first plaintiff's office stacks of copies of order sheets which were sent by the second plaintiff to the first plaintiff. This took place sometime in February 1996, and to Makoto Togase, it was a surprise move. Makoto Togase did not question Wong Geok Cheong about the incident because the latter was the general manager of the first plaintiff and the third defendant. Makoto Togase also confirmed the incident that happened on 12 September 1996, when Dato' Wong and Wong Geok Cheong went to the first plaintiff's premises with lorries and workers to remove the machineries and the moulds. It was deposed that as there were thousands of moulds at the first plaintiff's factory premises, it had taken a long time, a time consuming exercise, to check the odd ones and types that were missing. Makoto Togase deposed that he recently was informed by an ex-worker who had visited the fourth defendant's factory premises to the effect that the ex-worker saw a large number of original moulds which were from the plaintiffs being used together with new replicas at the fourth defendant's factory premises. It was deposed that there was a possibility that there were many more stolen moulds which were kept at the fourth defendant's factory premises.

The sum total of Makoto Togase's affidavit in encl 5 confirmed the contents of Mitsuhiko Sakamoto's affidavit in encl 5a thereby giving mileage to the plaintiffs.

The ex parte order granted on 8 January 1997, restrained Dato' Wong, Wong Geok Cheong and the fourth defendant from continuing to manufacture and deal with certain cosmetic and sponge products which closely resembled the first plaintiff's and the third defendant's products. To be precise, it restrained Dato' Wong, Wong Geok Cheong and the fourth defendant by themselves or by their directors, employees, agents or servants or otherwise howsoever, from manufacturing, exporting, selling or offering for sale cosmetic sponge products similar to and/or closely resembling the first plaintiff's cosmetic sponge products and/or the third defendant's products. A Mareva injunction was also obtained to prevent Dato' Wong and Wong Geok Cheong from removing from jurisdiction, dissipating or dealing in any manner whatsoever, the assets of the fourth defendant within the jurisdiction including but not limited to monies in the bank account or accounts of the fourth defendant. It was clear that the Mareva injunction so obtained was to prevent both Dato' Wong and Wong Geok Cheong from negating the effect of a judgment which may be entered against them from disposing of the assets of the fourth defendant before execution on the judgment can be levied. As I said elsewhere, a Mareva injunction essentially

restrains a defendant from disposing of, removing or otherwise dissipating his assets. The Mareva injunction that the plaintiffs sought here were sought for before judgment. Mareva injunction not only affect the assets in the legal ownership of the defendant (*Oceanica Castelana Armadora SA v Mineralimportexport (Barclays Bank International Ltd, Intervening), The Theotokos and other related applications* [1983] 2 All ER 65) but it may extend and affect assets which may belong to third parties provided there are good and exceptional reasons (*SCF Finance Co Ltd v Masri & Anor* [1985] 2 All ER 747). The subject matter of a Mareva injunction cover both tangible and intangible assets. Thus, joint bank accounts, chattels and choses in action can conveniently be categorized as subject-matter of a Mareva injunction (*Z Ltd v A & Ors* [1982] 1 All ER 556; and *CBS United Kingdom Ltd v Lambert & Anor* [1982] 3 All ER 237). I venture to say that a Mareva injunction will even affect assets acquired by the defendant after the granting of the injunction (*TDK Tape Distributors (UK) Ltd v Videochoice Ltd & Ors* [1985] 3 All ER 345).

Mr M Pathmanathan, assisted by Mr Gan Techiong, for the plaintiffs, rightly argued that the second plaintiff, as a minority shareholder of the third defendant, was compelled to sue Dato' Wong, Wong Geok Cheong and the fourth defendant on behalf of the third defendant. It was said that this was an exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189. The facts in that case were that two shareholders sued five directors for fraudulent misapplication of the company's funds and the two shareholders claimed that the five directors should compensate the company. It was obvious that the plaintiffs sued on behalf of themselves and all the other shareholders except the defendants. Wigram VC decided that the suit could not be maintained and was of the view that the body corporate was the proper plaintiff. It would appear that Wigram VC accepted the probability that in some circumstances it would be justifiable to depart from the rule that the body corporate was the proper plaintiff but his Lordship was of the view that there was nothing in the case put by the plaintiffs to justify that departure. Wigram VC too mentioned the possibility that a general meeting might decide by a simple majority that the directors should not be sued. The general meeting might equally well decide that the company should sue the directors. There was nothing in the plaintiffs statement of claim to show that the latter possibility was excluded. It is pertinent to point out that the potentiality of action by the general meeting is the second aspect of the rule in *Foss v Harbottle* and that is sometimes referred to as the internal management aspect (*Australian Coal & Shale Employees' Federation v Smith* (1937) 38 SR (NSW) 48 at pp 54–56). *Foss v Harbottle* propounded the proposition that the company is the proper plaintiff to bring an action in respect of a wrong done to it; it is for the person injured to file the civil suit rather than have other persons sue on behalf of the injured person; it is for the injured person to ponder and decide whether to set the legal machinery in motion or otherwise.

In my judgment, the present case was clearly an exception to the *Foss v Harbottle* principle. How could the plaintiffs stand idle when Dato' Wong and Wong Geok Cheong perpetrated fraud on the minority? It has been said

that fraud must be so serious that the minority are entitled to wring their hands and complain that the company would be remiss in letting the company's cause of action go by default. The best example that comes to mind would be the case where the property of the company is being misappropriated (*Cook v GS Deeks & Ors* [1916] 1 AC 554; *Atwool v Merryweather* (1867) LR 5 Eq 464n; *Menier v Hooper's Telegraph Works* (1874) 9 Ch App 350). It will be recalled that Ong Gek Ching @ Wong Gee Ching is the younger brother of Dato' Wong and together they held no less than 52.67% stake in the third defendant as compared to the second plaintiff's stake of 47.33% in the third defendant. Since Ong Gek Ching @ Wong Gee Ching now resides in Australia, his shareholding in the third defendant was held and controlled by none other than Dato' Wong. Now, as the latter held 52.67% stake in the third defendant, it was simply an impossible task for the third defendant to pass a resolution to sue Dato' Wong and Wong Geok Cheong. There was affidavit evidence to show that both Dato' Wong and Wong Geok Cheong had, through their scheming, unlawfully utilized the funds of the first plaintiff for their personal gain; these were blatant acts tantamount to breach of trust in regard to the first plaintiff and the third defendant. When Mitsuhiko Sakamoto managed to obtain photocopies of UMBC cheques issued from the first plaintiff's account, a startling discovery was uncovered. Both Dato' Wong and Wong Geok Cheong bled the funds of the first plaintiff for their personal gains. Wong Geok Cheong's affidavit in encl 15 that was affirmed on 18 January 1997 at para 8 thereof, did not deny that they were siphoning the funds of the first plaintiff. They were able to do so because of the misplaced trust which Mitsuhiko Sakamoto reposed on both of these two personalities — they were nothing more than leeches. Mitsuhiko Sakamoto agreed that the cheques of the first plaintiff and the third defendant had to be signed by either Dato' Wong or Wong Geok Cheong and Mitsuhiko Sakamoto. Since the latter was not in the country, he pre-signed the cheque books for the first plaintiff and the third defendant and this paved the way for both Dato' Wong and Wong Geok Cheong to misappropriate the funds of the first plaintiff and the third defendant. There was a systematic attempt at killing the third defendant, literally. There was affidavit evidence to show that the third defendant was a successful business venture and can be categorized as a very healthy company. In the financial year of 1995, there was evidence that the third defendant made a profit of RM624,975. To stifle the third defendant, both Dato' Wong and Wong Geok Cheong incorporated the fourth defendant which was in the same business as the third defendant. To propel the fourth defendant, both Dato' Wong and Wong Geok Cheong stole moulds belonging to both the plaintiffs and the third defendant, and transferred these moulds to the fourth defendant. Of course from those moulds the fourth defendant began its production and operation. Mr M Pathmanathan rightly pointed out that the Wong brothers spirited away documents and information about the third defendant's valued and established customers. The fourth defendant had the audacity to manufacture similar products using those moulds and sold those finished products to the first and second plaintiffs' customers. The goodwill of the

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first and second plaintiffs' were never sold to the fourth defendant and even if there were such sales (which was not the case here), the fourth defendant should be restrained by an injunction from canvassing the customers of the first and second plaintiffs. But unfortunately, this was not the prayer which the plaintiffs sought for in encl 6. Hope JA in *Mordecai v Mordecai* (1988) 12 NSWLR 58 at p 65 of the report, had this to say:

> *Trego v Hunt* [1896] AC 7 is the long-standing authority for the proposition that where goodwill is sold without any special covenant against competition, although the vendor may set up a rival business, he is not entitled to canvass the customers of the old firm and he may be restrained by injunction from doing so.

The Wong brothers too were said to commit criminal acts including theft and deception. There was affidavit evidence to show that those acts of thefts were witnessed by the employees of the third defendant and statutory declarations were sworn in that direction. Both Dato' Wong and Wong Geok Cheong orchestrated the mass resignations of employees from the first plaintiff and the third defendant, and these employees were then re-employed by the fourth defendant. There was therefore a deliberate sabotage and disruption of production of the first plaintiff and the third defendant. It is interesting to note that all the accounts in item 31 of encl 21 (an affidavit in reply of Mitsuhiko Sakamoto that was affirmed on 20 January 1997) at p 70, were seized pursuant to the Anton Piller order dated 8 January 1997, in the fourth defendant's premises. Without the advantage of that Anton Piller order, the plaintiffs would not be able to exhibit those accounts in encl 21 and this court would be deprived of the privilege of perusing through them. Briefly put, an Anton Piller order is mandatory in nature and it may be granted ex parte, as happened in this case, to authorize the plaintiffs or intended plaintiffs to enter the premises of the fourth defendant to search for articles and/or documents kept in the premises and to inspect them and remove them to the safe keeping of the plaintiffs' solicitors. It is obvious that the main object of an Anton Piller order is to prevent the destruction or concealment of evidential material which may be relevant in a pending or intended litigation. Of pertinence to note is the availability of the Anton Piller order at any stage of the proceeding and it even extends to all kinds of cases (*Yousif v Salama* [1980] 3 All ER 405 and *Lian Keow Sdn Bhd v C Paramjothy & Anor* [1982] 1 MLJ 217). In the leading case of *Anton Piller KG v Manufacturing Processes Ltd & Ors* [1976] 1 All ER 779, the English Court of Appeal held that the court has an inherent jurisdiction to give an order requiring the defendant to permit the plaintiff to enter the defendant's premises in order to inspect and remove documents and things, provided that: (i) there is an extremely strong prima facie case against the defendant; and (ii) the damage, potential or actual, is very serious for the plaintiff and there is clear evidence that the defendant has in his possession incriminating evidence or things which he may destroy before an inter partes application can be heard. These orders have since been called Anton Piller orders and it is germane to mention that these orders too have been approved by the English House of Lords in the case

of *Rank Film Distributors Ltd & Ors v Video Information Centre & Ors* [1981] 2 All ER 76. Back home in the country, the then Federal Court in *Asia Television Ltd & Anor v Viwa Video Sdn Bhd and connected cases* [1984] 2 MLJ 304, reversed the High Court judge's decision to set aside the Anton Piller orders that were granted and restored those orders. The plaintiffs, through their solicitors, were very prudent when they extracted the order dated 8 January 1997, as reflected in encl 8, as that order was so drawn as to extend to no further than the minimum extent necessary to achieve the preservation of documents or articles which may otherwise be destroyed (*Columbia Picture Industries Inc & Ors v Robinson & Ors* [1986] 3 All ER 338 at p 371). This was my judgment and I so hold accordingly.

Mitsuhiko Sakamoto, in encl 21, vividly described the relevant evidence which the plaintiffs discovered pursuant to the Anton Piller order. A check with the fourth defendant's office on 9 January 1997, confirmed all the facts as deposed to by Mitsuhiko Sakamoto in encl 5a. This discovery shocked Mitsuhiko Sakamoto. The actual state of affairs was more serious and grave. The list of documents that were surrendered as reflected in exh 'MS23' was, to say the least, indicative of the gravity of the situation. The seized documents from the fourth defendant's premises showed that Dato' Wong and Wong Geok Cheong had been using the fourth defendant as their corporate vehicle whilst abusing their position of trust as the director and general manager of the first plaintiff and the third defendant respectively. Both these two recalcitrants had not only incapacitated the third defendant but had in fact stripped bare the third defendant so as to robe the fourth defendant, so to speak. All the documentary evidences showed that the third defendant's invoices, customer records and goodwill were utilized for the business of the fourth defendant. Dato' Wong remained, on record, as the director of both the first plaintiff and the third defendant to this day, and the appalling evidence uncovered as a result of the Anton Piller order showed serious breach of fiduciary duties and breach of trust committed by Dato' Wong with the assistance of Wong Geok Cheong. The seized documents itemized hereinunder, showed the breaches of fiduciary duties and trust committed by both of them:

(1) The third defendant's invoice No S–001 dated 4 March 1996, showed a sale to Yingkou Sanki Manufacturing Inc; but the bill of lading named the fourth defendant as the shipper (see the invoice and the bill of lading exhibited and collectively marked as 'MS24–A' of encl 21).

(2) The third defendant's invoice No S–002 was used on 22 March 1996, for a sale to Yingkou Sanki Manufacturing Inc but the bill of lading named the fourth defendant as the shipper (see the invoice and the bill of lading exhibited and collectively marked as 'MS24–B' of encl 21).

(3) The third defendant's invoice No S–003 dated 22 March 1996, showed a sale to Tokyo Puff Co Ltd but the bill of lading named the fourth defendant as the shipper (see the invoice and bill of lading exhibited and collectively marked as 'MS25' of encl 21).

(4) The third defendant's invoice No S–004 dated 22 March 1996 showed the obvious breach of trust and diversion of business from Tokyo Puff Co Ltd but the airway bill showed the fourth defendant as the shipper (see the invoice and the airway bill exhibited and collectively marked as 'MS26' of encl 21).

(5) It was said that naming the fourth defendant as Supertex Mfg Sdn Bhd was simply to confuse it with the third defendant. The fourth defendant's invoice showing its Chinese name was exactly the same as the third defendant's Chinese name (see exh 'MS27' of encl 21).

(6) Both Dato' Wong and Wong Geok Cheong diverted business from the following customers of the third defendant to the fourth defendant:

(a) Lek Eng Auto Parts Distributors Sdn Bhd;

(b) DHE Sdn Bhd;

(c) Der Sheng Rubber Products Sdn Bhd;

(d) Nipseals Sdn Bhd;

(e) Keat Seng Hardware Trading;

(f) Kim Joo Trading; and

(g) Hawk Soon Hin Industries Sdn Bhd.

(See exhs 'MS29' and 'MS30' of encl 21).

(7) Both Dato' Wong and Wong Geok Cheong had, in fact, blatantly diverted business from the third defendant to the fourth defendant (see the order sheets to the fourth defendant dated 18 July 1996, 5 August 1996, 22 August 1996, 27 August 1996, 9 September 1996, 17 September 1996, 1 October 1996, 30 October 1996 and 4 November 1996 — exhibited and marked as 'MS33' of encl 21).

It was deposed that the order dated 8 January 1997, stipulated a time span of up to 7 pm to execute the Anton Piller order and the plaintiffs' solicitor, Mr Gan Techiong, adhered strictly to it. By 7 pm sharp, Mr Gan Techiong stopped recording and listing those documents that were recovered. It was deposed, quite crucially, that there were several other files of the third defendant which were found in the fourth defendant's which Mr Gan Techiong did not have the time to recover. In *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371, the Supreme Court of Canada speaking through Laskin J had this to say on the fiduciary duty of directors as seen at pp 382–383 of the report:

> This court considered the issue of fiduciary duty of directors in *Zwicker v Stanbury et al* [1954] 1 DLR 257; [1953] 2 SCR 438, where it found apt for the purposes of that case certain general statements of law by Viscount Sankey and by Lord Russell of Killowen in *Regal (Hastings) Ltd v Gulliver et al* [1942] 1 All ER 378 at pp 381–389. These statements reflecting basic principle which is not challenged in the present case, are represented in the following passages, per Viscount Sankey:
>
> > 'In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of mala fides. The general rule of equity is that no one who has duties of a fiduciary nature

> to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his cestui que trust. The earlier cases are concerned with trusts of specific property: *Keech v Sandford* (1726) Sel Cas Ch 61, per Lord King LC. The rule, however, applies to agents, as, for example, solicitors and directors, when acting in a fiduciary capacity.'

Per Lord Russell of Killowen:

> 'In the result, I am of opinion that the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them. The equitable rule laid down in *Keech v Sandford* and *Ex p James* (1803) 8 Ves 337, and similar authorities applies ... in full force. It was contended that these cases were distinguishable by reason of the fact that it was impossible for Regal to get the shares owing to lack of funds, and that the directors in taking the shares were really acting as members of the public. I cannot accept this argument. It was impossible for the cestui que trust in *Keech v Sandford* to obtain the lease, nevertheless the trustee was accountable. The suggestion that the directors were applying simply as members of the public is a travesty of the facts. They could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain.'

I need not pause to consider whether on the facts in *Regal (Hastings) Ltd v Gulliver*, the equitable principle was overzealously applied; see, for example, Gower, op cit, at pp 535–537. What I would observe is that the principle, or, indeed, principles, as stated, grew out of older cases concerned with fiduciaries other than directors or managing officers of a modern corporation, and I do not, therefore, regard them as providing a rigid measure whose literal terms must be met in assessing succeeding cases. In my opinion, neither the conflict test, referred to by Viscount Sankey, nor the test of accountability for profits acquired by reason only of being directors and in the course of execution of the office, reflected in the passage quoted from Lord Russell of Killowen, should be considered as the exclusive touch stones of liability. In this, as in other branches of the law, new fact situations may require a reformation of existing principle to maintain its vigour in the new setting.

His Lordship Laskin J continued further and said at pp 383–384 of the report of the same judgment:

> The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there may be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for example, by reason of legal disability, to participate in the transaction. An analogous situation, albeit not involving a director, existed for all practical purposes in the case of *Boardman et al v Phipps* [1967] 2 AC 46, which also supports the view that liability to account does not depend on proof of an actual conflict of duty and self-interest.

Another, quite recent, illustration of a liability to account where the company itself had failed to obtain a business contract and hence could not be regarded as having been deprived of a business opportunity is *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162, a judgment of a court of first instance. There, the managing director, who was allowed to resign his position on a false assertion of ill health, subsequently got the contract for himself. That case is thus also illustrative of the situation where a director's resignation is prompted by a decision to obtain for himself the business contract denied to his company, and where he does obtain it without disclosing his intention.

What these decisions indicate is an updating of the equitable principle whose roots lie in the general standards that I have already mentioned, namely, loyalty, good faith and avoidance of a conflict of duty and self-interest. Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings. It is a necessary supplement, in the public interest, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgement of the importance of the corporation in the life of the community and of the need to compel obedience by it and its promoters, directors and managers to norms of exemplary behaviour.

In *Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209, Salleh Abas LP said (at p 210):

The law is clear that a director of a company is in fiduciary relationship with his company and as such he is precluded from acting in a manner which will bring his personal interest into conflict with that of his company. Clearly the formation of Perunding AJZ was carefully planned. The firm is not only a rival of Avel and Elmec of which at the material time the respondents were directors. It obtained the very job which was Avel's job. Not only that, the firm canvassed for work from Avel's and Elmec's established clients, Kontena Nasional Sdn Bhd and there is even evidence to show that the respondents engineered the resignations of the key personnel on channel three project. This is borne out by the evidence that the first respondent purporting to act as Avel's managing director informed STMB of the pending resignation of these personnel some three months before the personnel handed in their resignation letters. The result of this notification was at the expense of Avel which lost the job with the corresponding benefit to Perunding AJZ which gained it. It is, therefore, clear that there can be no defence to the issue of breach of fiduciary duties. In fact, the learned judge ruled that there was a clear breach but he was not prepared to give leave to Avel and Elmec to sign the judgment because, in his view, there were other reasons within the meaning of O 14 r 3 which entitled the respondents to defend the suit.

Reverting back to *Mordecai v Mordecai*, Hope JA had this to say of a breach of fiduciary duty particularly at p 63F–G to p 64A–E of the report:

The type of question which arises here was considered by Danckwerts J in *Aubanel and Alabaster Ltd v Aubanel* (1949) 66 RPC 343. There, relevantly, the defendant Aubanel was a partner in a firm Aubanel & Alabaster. The firm's business was sold to Aubanel & Alabaster Ltd of which Aubanel became a director. He was later employed by the company as managing director, and

he was also a substantial shareholder. Later, whilst still a director and shareholder but no longer being managing director, he joined with Alabaster in a partnership which traded in competition with the plaintiff.

Danckwerts J (at pp 346-347) having first discussed the law about competition in relation to the sale of the goodwill of the business and to employees, and having said that although a director is not an employee, it seemed to be accepted that he could engage in a competing business in the absence of any evidence of an agreement with the company to the contrary, said:

> 'There is very little authority on these matters. In *Buckley on Companies*, (13th Ed) at p 877, there is the following statement: "The principles above referred to (that is, that a director may not make a profit for himself from the use of the company's funds)" do not, however, preclude a director from carrying on business in the same field as the company on his own behalf, unless in so doing he makes use of the company's property or of some confidential information acquired by him as a director of the company", and this statement is in accordance with the observations of Lord Blanesburgh in *Bell v Lever Bros Ltd* [1932] AC 161 at p 194.
>
> It seems to me that the dangers of a director using confidential information (acquired as director) to assist him in the competing business and the difficulties of avoiding such use of any confidential information, are considerable, but I must accept the proposition that such competition is permissible. But solicitation of the company's customers is another matter. The function of a director is to supervise the carrying on of the company's business for the benefit of the company and its shareholders and to advance these interests. How can it be compatible with this function that the director should depreciate the value and progress of the company's business by asking the company's customers to cease to deal with the company and to deal with him in his competing business instead? It seems to me that this cannot be proper behaviour by a director. It is not necessary for me to consider the situation of a man who has ceased to be a director. I have to deal with the situation that the defendant is a director of the plaintiff company.'

This statement of the law would seem to be directly applicable to the circumstances of the case and I would respectfully adopt it.

Reverting back to the case of *Canadian Aero Service Ltd v O'Malley*, particularly at p 382, Laskin J described the obligations of a director in these words:

> An examination of the case law in this court and in the courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing ... .

It is my judgment that both Dato' Wong and Wong Geok Cheong were in a fiduciary position and their liability to account does not depend upon proof of mala fides. The rule of equity is that generally no one who has duties of a fiduciary nature to perform is allowed to enter into engagements

in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If, for instance, an individual who holds any property so acquired as trustee, he is bound to account for it to his cestui que trust. This rule applies to agents such as solicitors and directors when acting in a fiduciary capacity. It is interesting to reproduce the headnote to the case of *Ex p James* (1803) 8 Ves 337, which reads as follows:

> Purchase of a bankrupt's estate by the solicitor to the commission set aside. The Lord Chancellor would not permit him to bid upon the resale, discharging himself from the character of solicitor, without the previous consent of the persons interested, freely given, upon full information.

In trite terms, Lord Eldon LC in *Ex p James*, said at p 345:

> The doctrine as to purchase by trustee, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this; that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases.

Next, would be the case of *Hamilton v Wright* (1842) 9 Cl & Fin 111, where the headnote states:

> A trustee is bound not to do anything which can place him in a position inconsistent with the interests of his trust, or which can have a tendency to interfere with his duty in discharging it. Neither the trustee nor his representative can be allowed to retain an advantage acquired in violation of this rule.

And at p 124 of *Hamilton v Wright*, Lord Brougham said:

> The knowledge which he acquires as trustee is of itself sufficient ground of disqualification, and of requiring that such knowledge would not be capable of being used for his own benefit to injure the trust. The ground of disqualification is not merely because such knowledge may enable him actually to obtain an undue advantage over others.

The headnote to the case of *Aberdeen Rly Co v Blaikie Bros* (1854) 1 Macq 461, reads as follows:

> The director of a railway company is a trustee, and, as such, is precluded from dealing, on behalf of the company, with himself, or with a firm of which he is a partner.

At p 471, Lord Cranworth had this to say in *Aberdeen Rly Co v Blaikie Bros*:

> A corporate body can only act by agents, and it is of course the duty of those agents so as to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting or which possibly may conflict, with the interests of those whom he is bound to protect.

It is useful to recall a passage from the judgment of Bowen LJ in *Imperial Hydropathic Hotel Co, Blackpool v Hampson* (1883) 23 Ch D 1, where at p 12 his Lordship said:

> I should wish ... to begin by remarking this, that when persons who are directors of a company are, from time to time, spoken of by judges as agents, trustees, or managing partners of the company, it is essential to recollect that such expressions are used not as exhaustive of the powers and responsibilities of those persons, but only as indicating useful points of view from which they may, for the moment, and for the particular purpose be considered — points of view at which they seem for the moment to be either cutting the circle, or falling within the category of the suggested kind. It is not meant that they belong to the category, but that it is useful for the purpose of the moment to observe that they fall, pro tanto, within the principles which govern that particular class.

Lord Wright in *Regal (Hastings) Ltd v Gulliver & Ors* [1942] 1 All ER 378 at p 392, observed that:

> ... both in law and equity, it has been held that, if a person in a fiduciary relationship makes a secret profit out of the relationship, the court will not inquire whether the other person is damnified or has lost a profit which otherwise he would have got. The fact is in itself a fundamental breach of the fiduciary relationship.

In the light of these passages, it was apparent that both Dato' Wong and Wong Geok Cheong committed breaches of fiduciary duties and trust and it was irrelevant whether the plaintiffs were damnified or have lost profits which they rightly deserved. It must be recalled that *Imperial Hydropathic Hotel Co, Blackpool v Hampson*, makes no exception to the general rule that a solicitor or director, if acting in a fiduciary capacity, is liable to account for the profits made by him from knowledge acquired when so acting.

When would a director be in breach of trust? It is said that a director is liable if the company suffers a loss owing to his being ignorant of some fact of which he should have been aware. The case of *Re Newcastle-upon-Tyne Marine Insurance Co; ex p Brown* (1854) 19 Beav 97 at p 104, establishes the principle that: 'A person when he becomes a director accepts a trust ... It appears but fit that he should be charged with the knowledge of those facts ... which it was his bounden duty to know'. *Bahin v Hughes* (1886) 31 Ch D 390, establishes the principle that inaction by one trustee may make him liable for the positive breach of trust by a co-trustee. A fortiori, if a director knows of a breach by a co-director, he must, in the same way as a trustee, take active steps to protect the company's interests (*Brice v Stokes* (1805) 11 Vesp 319). In the eyes of the law, directors are agents of the company for which they act. The general principles of the law of principal and agent regulate, in most respects, the relationship of the company and its directors. This sound principle of law has been established since 1866 in the case of *Ferguson v Wilson* (1866) 2 Ch App 77, where Cairns LJ blazed the trail when he said:

> What is the position of directors of a public company ? They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those

> directors, merely the ordinary case of principal and agent. Wherever an agent is liable, those directors would be liable; where the liability would attach to the principal, and the principal only, the liability is the liability of the company.

In *Charitable Corp v Sutton* (1742) 2 Atk 400, Lord Hardwicke LC held that directors of a chartered corporation who had misapplied its funds and committed breaches of its by-laws were liable as trustees for breach of trust. Again, in *York and North Midland Rly v Hudson* (1853) 16 Beav 485, directors who had improperly dealt with the funds of the company were held liable as 'trustees'. Romily MR, best summed up the law in these words:

> The directors are persons selected to manage the affairs of the company for the benefit of the shareholders. It is an office of trust which, if they undertake, it is their duty to perform fully and entirely. A resolution by shareholders therefore, that shares or any other species of property shall be at the disposal of the directors, is a resolution that it shall be at the disposal of trustees; in other words, that the persons entrusted with that property shall dispose it off, within the scope of the functions delegated to them, in the manner best suited to benefit their cestuis que trust.

In a similar vein, Sir George Jessel in *Re Forest of Dean Coal Mining Co* (1878) 10 Ch D 450 said:

> ... directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control ... .

Some instances of breaches of trust by directors can be found in the following cases:

(1) *Land Credit Co of Ireland v Lord Fermoy; ex p Munster* (1870) 5 Ch App 323, where company's money was used for purchasing its shares.

(2) *Joint Stock Discount Co v Brown* (1869) LR 8 Eq 381, where company's money was used in buying shares in another company.

(3) *Imperial Mercantile Credit Association v Chapman* (1871) 19 WR 379, where loans were advanced to brokers for losses incurred in 'bulling' the market.

(4) *Selangor United Rubber Estates Ltd v Cradock (A bankrupt) & Ors (No 3)* [1968] 2 All ER 1073; [1968] 1 WLR 1555, where company's money was utilized for acquisition of its own shares.

No words could possibly describe the scheming hatched by Dato' Wong with the active participation of Wong Geok Cheong to enrich the fourth defendant at the expense of the third defendant. By diverting business from the third defendant to the fourth defendant, both Dato' Wong and Wong Geok Cheong had unlawfully used their powers and undermined the third defendant. They have fettered their powers with promises to other persons (*Clark v Workman* [1920] 1 IR 107).

By way of a digression, in the context of a criminal breach of trust by a chairman and a managing director, the case of *Tan Sri Tan Hian Tsin v PP* [1979] 1 MLJ 73, immediately comes to mind. There the appellant was charged for criminal breach of trust of the sum of RM200,000 belonging to

a company, of which the appellant was the chairman and managing director. The cheque had been issued in payment of an alleged debt to a company in Taiwan but it had been paid into the account of a company, of which the appellant and his wife were the only shareholders. In dismissing the appeal, the then Federal Court affirmed the decision of the trial court. The magnitude of a criminal breach of trust cannot be over emphasized and both Dato' Wong and Wong Geok Cheong should be well advised to tread cautiously.

The inter partes hearing did not proceed smoothly. Several adjournments were granted and each adjournment carries with it the extension of that order that was granted by this court on 8 January 1997, as reflected in encl 8. In reality, the order in encl 8 was extended till the completion of the trial of the present civil suit.

Mitsuhiko Sakamoto's affidavit in reply in encl 21 showed the gravity of the situation. It was clear that the third defendant's business was not only wound up, in fact, it ceased to operate. Mr M Pathmanathan rightly submitted that the fourth defendant has helped themselves to everything that belonged to the third defendant. A move that was designed to benefit the fourth defendant at the expense of the third defendant. It was a move that led to the 'untimely demise' of the third defendant. The documents that were exhibited in encl 21 confirmed breaches of fiduciary duty and trust as exemplified by the authorities alluded to and elaborated in this judgment. It must be recalled that Dato' Wong remained as the director of the first plaintiff and the third defendant while Wong Geok Cheong was, at all material times, the general manager of the first plaintiff and the third defendant. This was a classic case where both Dato' Wong and Wong Geok Cheong failed to promote the interests of the first plaintiff and the third defendant whose affairs they were conducting. As agents, both these two characters have duties to discharge and these duties were fiduciary in nature. Both of them miserably failed to discharge their fiduciary duties. They entered into engagements which conflict and run counter to their personal interests. As trustees, both these two characters did not act in the best interests of the first plaintiff and the third defendant. It is now well known that companies cannot operate except through and by its directors. The destiny of a company must surely be dependent on the character of its director. A good director will steer the company to greater heights. A bad director spells doom to the company. The fiduciary duties of directors can never be compromised and they are indeed stringent as can be seen from the authorities that have been cited in this judgment.

Isao Kuraishi, the managing director of Nakamura Bussan Kabushiki Kaisha, a customer and shareholder of the fourth defendant affirmed an affidavit on 15 January 1997, as reflected in encl 12 and at para 7(a) thereof, it was deposed that the products manufactured by the first plaintiff and the third defendant were not similar to the ones manufactured by the fourth defendant as they differed in colour, shapes, chemical content, texture and other specifications. It was deposed that a customer who purchased the products manufactured by the fourth defendant would not be misled that the products were manufactured by the first plaintiff and the third

defendant. Now, if these allegations were true, there was no cause to worry. The injunctive orders which the plaintiffs obtained should not restrain them at all and they should not be bothered about it nor fuss over it. But this was not to be.

Both Dato' Wong and Wong Geok Cheong had the cheek to cheat the Government of Malaysia. Through their staff, by way of a facsimile message dated 4 October 1996, there was a request to Nakamura Bussan Kabushiki Kaisha to prepare two invoices: one for 'custom purpose' and the other for 'the actual invoice of billing'. The reply that came in showed the willingness to aid and abet the offence of evading import duty. The words employed in the reply were: 'It is OK. We are on your side.' There was a concerted denial of using the plaintiffs' production techniques and secrets but the documents as exhibited in encl 21 showed otherwise. A few examples would suffice:

(a) There was a message from Nakamura Bussan Kabushiki Kaisha to Lee Gek Peng of the fourth defendant dated 27 May 1996, complaining that the fourth defendant's SPC treatment for sponge was very bad (see exh 'MS41A' of encl 21).

(b) The handwritten reply from Lee Gek Peng of the fourth defendant on 27 May 1996 ,was worded in this way: 'We are do the same way as Yukilon before doing ...' — not in perfect English but it was sufficient to convey the message of siphoning trade secrets and adopting production techniques of the plaintiffs (see exh 'MS41B' of encl 41).

(c) The file as listed in item 13 of the list entitled 'Sample Record Formulation & Latex Compounding' contained the secret formula of the second plaintiff in regard to the chemical and latex compound and the colour formula (see exhs 'MS42A' and 'MS42B' of encl 21).

(d) A handwritten message dated 18 March 1996, from one Koda, an employee of Nakamura Bussan Kabushiki Kaisha to Lee Gek Peng of the fourth defendant showed the magnitude of siphoning trade secrets (see 'MS43' of encl 21).

Masayuki Jo, a director and shareholder of the fourth defendant, deposed an affidavit on behalf of the fourth defendant as reflected in encl 13 and that affidavit was affirmed on 16 January 1997. It is interesting to note that Masayuki Jo is the brother-in-law of Mitsuhiko Sakamoto and at the same time was Mitsuhiko Sakamoto's immediate predecessor — these facts were not deposed at all in encl 13 and they were exposed by Mitsuhiko Sakamoto in encl 21. Be that as it may, Masayuki Jo deposed that he qualified as a chemist and graduated from Kagoshima University in Japan in 1956. He further deposed that he joined the second plaintiff as a chemist in 1962 and became its president in 1984. He was then made the chairman of the board in the second plaintiff in 1990, but without representative powers until he resigned in December 1994. Masayuki Jo deposed further that he was the first person in Japan who discovered and developed the technology of making cosmetic sponges from raw materials such as natural rubber (NR) and synthetic rubber comprising of styler butagien rubber (SBR) and acrylic nitril butagien rubber (NBR). Masayuki Jo deposed proudly that the

technology using NR and SBR was discovered by him in 1967 and that using NBR, in 1976. It was also deposed that he was instrumental in assisting the rubber manufacturer, viz, Nippon Zeon Co Ltd in Japan, who was the sole supplier of synthetic rubber in Asia to produce NBR latex that was oil resistant for use in making cosmetic sponges. In regard to the design, specification of the products and marketing to meet the end user's requirements, Masayuki Jo deposed that he always worked closely with the customers, viz, Nakamura Bussan Kabushiki Kaisha of Tokyo Puff Co Ltd as well as other customers who marketed such products to the cosmetic companies like Shishedo, Estee Lauder, etc. It was deposed that the design and specification of the cosmetic sponges particularly details as to its size, thickness, colour, hardness factor in the order sheets as adverted to by Mitsuhiko Sakamoto in encl 5a, para 14.1 thereof, have always been provided by the customers, viz, Nakamura Bussan Kabushi Kaisha, Tokyo Puff Co Ltd, etc. It was deposed that there was no necessity at all for the fourth defendant to acquire such information through the first plaintiff. It was deposed by Masayuki Jo that the technology discovered by him was not patented as an intellectual property by the second plaintiff at all. He proudly declared that he imparted that technology to the staff of the second plaintiff since its discovery and that fact has become obvious and well known to the masses. He deposed that currently there were three other major producers or competitors in Japan that produced similar products as both the plaintiffs:

(1) One in Taiwan.

(2) Five or six in Korea, as well as in other countries.

Masayuki Jo named the producers or competitors as Nichiei Rubber Co Ltd, Inoue Mtp Co Ltd, Yung Ho Chemical Industrial Co Ltd, Sun Jin Special Sponge and Jeil Sponge Co Ltd. Of crucial importance was the declaration by Masayuki Jo that the said technology was not a trade secret belonging to him or anybody else for that matter. Masayuki Jo denied that both Dato' Wong and Wong Geok Cheong disclosed manufacturing methods and trade secrets of the first plaintiff and the third defendant to the fourth defendant. He categorically deposed that the fourth defendant's know-how in producing the cosmetic sponges and similar products came entirely from him as it was he who taught and imparted that knowledge. He deposed that he was not in anyway restricted from imparting that kind of technology to the fourth defendant. He deposed that as the person who discovered and developed the technology of cosmetic sponge products, he was able to say that the material factor in producing quality products of this nature was not dependent on the type, shape or size of the moulds as alleged, but rather it was dependent on the chemical formula and ingredients for making the cosmetic sponges. He deposed categorically that long aluminium moulds do not require any technique or formula to be made or used. Masayuki Jo deposed that he had been in this line of business for a very long time and that customers like Nakamura Bussan Kabushiki Kaisha, Tokyo Puff Co Ltd and a few others prefer to purchase the cosmetic sponge products from him although they were free to purchase from anyone

else. For these reasons, it was said that these customers were at liberty to obtain their supplies from the fourth defendant instead of from the first plaintiff. It was said that the customers had the right to choose and that it was not true that the fourth defendant was passing-off their products as that sold by the first plaintiff or the third defendant.

The sting of Masayuki Jo's affidavit was that he claimed to be the inventor of the technology of the second plaintiff and consequently there was no reason for Dato' Wong and Wong Geok Cheong and the fourth defendant to steal anything from the plaintiffs.

It is interesting to note that Mitsuhiko Sakamoto took exception to the averments of Masayuki Jo in encl 13. Mitsuhiko Sakamoto in encl 21 took pains to reply to encl 13. In encl 21, it was deposed that the second plaintiff's directors and shareholders were aware that Masayuki Jo had acted seriously in breach of his duties and obligations to the second plaintiff and were, in fact, in the process of collating evidence to sue him in Japan. It was the best remedy to sue Masayuki Jo in Japan because there was no existing reciprocal enforcement of judgments between Malaysia and Japan. It was deposed that from the Japanese point of view, 'honour' was regarded as the foremost ingredient in a Japanese society. For that reason, Masayuki Jo was now regarded as a 'traitor'. This was a strong allegation. It was also deposed that Masayuki Jo had made misleading statements in encl 13. Masayuki Jo failed to disclose the following facts:

(a) that he was appointed the president of the second plaintiff in 1984, by virtue of his relationship with the Sakamoto family who were the major shareholders of the second plaintiff; it was a tradition that the company president must at all times be held by a family member of the major shareholders;

(b) that he retired in 1994 because he has reached the age of about 62 years old;

(c) that he received retirement benefits in the region of approximately RM6 m for the simple reason that he was the relative of the major shareholders of the second plaintiff; and

(d) that after his retirement, he continued to receive monthly consultant fees of about 500,000 yen from the second plaintiff.

Of crucial importance, and the averment that cut into encl 13 was the allegation that Masayuki Jo had made false claims that he was the inventor of the technology of making cosmetic sponge from raw materials such as NR, SBR and NBR. The truth of the matter was that:

(i) the second plaintiff's first chief engineer by the name of Kuro Takahashi who started the company with Mitsuhiko Sakamoto's late father by the name of Satoru Sakamoto in 1951, had started using NR as a production material long before Masayuki Jo joined the company;

(ii) Masayuki Jo was a mere junior engineer who worked under Kuro Takahashi; and

(iii) the second plaintiff has a research and development department with a team of engineers and chemists performing research work simultaneously and, consequently, no single individual can claim to be an inventor.

Thus, it follows that all research works were geared for the benefit of the second plaintiff. The facilities and funds for that research were essentially the domain of the second plaintiff and all the research results ranging from formula to technology and the various techniques to be employed therein were the properties of the second plaintiff solely. It was a blatant lie and an attempt at misleading this court when Masayuki Jo deposed that there was no patent for the second plaintiff's technology. The truth of the matter was that the second plaintiff owned several patents in Japan. The second plaintiff too have been granted a patent by the USA patent office vide patent No 4,776,356 as seen in exh 'MS51' at p 121 of encl 21. Exhibit 'MS51' shows the inventors to be 'Matsayuki Jo' and 'Mitsuhiko Sakamoto' both of Tokyo, Japan but the assignee of that invention went to the second plaintiff — in Japanese language it was referred to as 'Yukigaya Kagaku Kogyu Kabushiki Kaisha' referring no doubt to 'Yukigaya Chemical Industry Co Ltd'. An assertion was made that Masayuki Jo had resorted to making misleading claims and statements because he had invested in the fourth defendant. In regard to Masayuki Jo's allegation that the information contained in the order sheets were not secret, the response was that the information enabled a new manufacturer to produce the correct samples in order to approach the customers, for otherwise there would be no way to approach the customers. Mitsuhiko Sakamoto was advised that he need not go into technical details in his affidavit. He emphasized that Masayuki Jo did not help Nippon Zeon Co Ltd to produce NBR latex. The truth of the matter was that Nippon Zeon Co Ltd developed a new NBR latex with high solid contents of 67% than the previous forms of NBR latex and the second plaintiff's research department managed to use the new NBR latex successfully for making cosmetic sponge products. It was deposed that Masayuki Jo's claim that he taught the fourth defendant was untrue as the former resided in Japan and had never held any work permit to work in Malaysia. It was pointed out that the production manager of the fourth defendant by the name of Lee Gek Peng was formerly an employee of the third defendant and it was the second plaintiff that trained Lee Gek Peng in Japan. It was deposed that Masayuki Jo's allegation that no special technique was required in regard to the usage of long aluminium was nothing but a lie. For fear of revealing the secret formula in writing, Mitsuhiko Sakamoto deposed that Masayuki Jo knew that if the right technique and formula were not used while using aluminium moulds, then the sponge would turn out defective.

An argument was advanced that there was a failure on the part of the plaintiffs to advert to the role of Masayuki Jo when the ex parte Mareva injunction was sought for and consequently the Mareva injunction ought to be set aside. Now, the principles to be applied in determining whether there has been relevant non-disclosures were lucidly set out in *Brink's MAT Ltd v Elcombe & Ors* [1988] 3 All ER 188, when Slade LJ remarked at pp 194–195:

A Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application, the practical realities of any case before the court cannot be overlooked. By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the *R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac* [1917] 1 KB 486, principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.

Though in the present case I agree that there was some material, albeit innocent non-disclosure on the application of Roch J, I am quite satisfied that the punishment would be out of all proportion to the offence, and indeed would cause a serious potential injustice if this court were, on account of such non-disclosure, to refuse to continue the injunction granted by Roch J on 9 December 1986.

I was satisfied with the explanation of Mr M Pathmanathan when he submitted that there was no mention, initially, of the role of Masayuki Jo because the plaintiffs were not aware of the full extent of Masayuki Jo's involvement with the fourth defendant until their affidavits were filed. Indeed after Masayuki Jo's affidavit was filed the plaintiffs have decided to sue him in Japan. The court certainly has a discretion, notwithstanding proof of material non-disclosure which justifies the immediate discharge of an ex parte injunction, to continue that injunction or make a new order on terms. I would certainly exercise that discretion in favour of the plaintiffs on the same terms. Ralph Gibson LJ in *Brink's MAT Ltd v Elcombe & Ors* observed at pp 192–193 of the report:

In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following: (i) the duty of the applicant is to make 'a full and fair disclosure of all the material facts': see *R v Kensington Income Tax Comrs; ex p Princess Edmond de Polignac* [1917] 1 KB 486 at p 514 per Scrutton LJ; (ii) the material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see the *Kensington Income Tax Comrs*, at p 504 per Lord Cozens — Hardy MR, citing *Dalglish v Jarvie* (1850) 2 Mac & G 231 at p 238; 42 ER 89 at p 92 and *Thermax Ltd v Schott Industrial Glass Ltd* [1981] FSR 289 at p 295 per Browne-Wilkinson J; (iii) the applicant must make proper inquiries before making the application: see *Bank Mellat v Nikpour* [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries; (iv) the extent of the inquiries which will be held to be

proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc v Robinson* [1986] 3 All ER 338; [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *Bank Mellat v Nikpour* [1985] FSR 87 at pp 92-93, per Slade LJ; (v) if material non-disclosure is established, the court will be 'astute to ensure that a plaintiff who obtains ... an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty ...': see *Bank Mellat v Nikpour* (at p 91), per Donaldson LJ citing Warrington LJ in the *Kensington Income Tax Comrs* case; (vi) whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented; (vii) finally 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': see *Bank Mellat v Nikpour* [1985] FSR 87 at p 90, per Lord Denning MR.

In regard to the Anton Piller order that was obtained ex parte by the plaintiffs, the appropriate time for the court to hear and determine an application by the defendants to discharge that Anton Piller order on the ground that it was obtained as the result of a material non-disclosure by the plaintiffs, was at the trial rather than during the interlocutory stage of the proceedings for the simple reason that the Anton Piller order that was obtained ex parte having, usually, been executed, like the present case, the only effect of the non-disclosure will be to affect the plaintiffs' liability under his cross-undertaking in damages and interlocutory proceedings was not the appropriate time for the court to hear evidence and determine allegations of what has happened in the past. Sir Nicolas Browne-Wilkinson VC in *Dormeuil Freres SA & Anor v Nicolian International (Textiles) Ltd* [1988] 3 All ER 197, aptly said at pp 200–201 of the report in these words:

> In my judgment, save in exceptional cases, it is not the correct procedure to apply to discharge an ex parte injunction on the grounds of lack of full disclosure at the interlocutory stage of the proceedings. The purpose of interlocutory proceedings is to regulate the future of the case until trial.
>
> Where an Anton Piller order has been made ex parte, in the vast majority of cases the order has been executed before the inter partes hearing. Setting aside the Anton Piller order cannot undo what has already been done. As to the injunction contained in the ordinary Anton Piller order, that is directed to last only until the inter partes hearing of the motion. The correct course, as the Court of Appeal decisions show, is to regulate the matter for the future on the basis of the evidence before the judge on the inter partes hearing. The sole relevance of the question 'Should the ex parte order be set aside?' is, so far as I can see, to determine the question whether the plaintiff is liable on the cross-undertaking in damages given on the ex parte hearing. That is not an urgent

matter. It is normally much better dealt with at the trial by the trial judge, who knows all the circumstances of the case and is able, after cross-examination, to test the veracity of the witnesses.

Similar considerations apply in the case of an ex parte Mareva injunction. When the motion comes before the court inter partes, the court can then on the evidence before it from both sides decide what is the correct form of the Mareva relief to grant until trial. The question whether the earlier ex parte order should be set aside is not an urgent matter and is only relevant to the cross-undertaking in damages. Similar considerations apply in the case of ordinary ex parte injunctions.

Further down the same page of the same judgment, Sir Nicolas Browne-Wilkinson VC continued, and his words must surely apply to the present case, in this vein:

> In my judgment, therefore, in the ordinary case, it is wrong on the hearing of an inter partes motion to go into the huge complexities involved in seeking to disentangle at that stage whether there was full disclosure when the ex parte order was obtained. The matter should normally be dealt with at trial in the way I indicated. The right course, therefore, would normally be to adjourn an application to set aside the ex parte order to be dealt with at the trial. That is the course that I think is appropriate in this case, but neither the plaintiffs nor the defendants are happy with that.

In my judgment, the question whether or not there has been full disclosure should normally be dealt with at the trial and not at the inter partes hearing. At the hearing, all hell should break lose, so to speak, so as to enable the matters to be ventilated to the fore.

The plaintiffs here succeeded in establishing a good arguable case for the purpose of a Mareva injunction; it was capable of a serious argument and have a better than 50% chance of success (*Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH Und Co KG* ('*The Niedersachsen*') [1983] 1 WLR 1412). This was my judgment and I so hold accordingly. In regard to the Anton Piller order reference to the headnote of the case of *Vapormatic Co Ltd v Sparex Ltd & Anor* [1976] FSPLR 451, would be enlightening and there it was said that:

> The plaintiffs, suppliers of spare parts for agricultural machinery, were informed by a former employee of the first defendants, who were competitors of the plaintiffs, that the second defendant, a former employee of the plaintiffs, had supplied the first defendants with a computer print out of the plaintiffs' customers' names and addresses. Not knowing the full extent of the information disclosed and fearing that evidence would be hidden or destroyed if the defendants were given notice of the application, the plaintiffs sought an order ex parte that the defendants should permit the inspection of their premises and the removal of documents found therein which related to confidential information belonging to the plaintiffs.
>
> Held, granting the order sought: (1) that the plaintiffs had shown strong prima facie case; that potential damage to them would be very serious and that there was clear evidence that the defendants possessed information which they might destroy or dispose of so as to defeat the ends of justice before any application inter partes could have been made.

Graham J in deciding to grant the Anton Piller order in *Vapormatic Co Ltd v Sparex Ltd & Anor* had this to say at p 452 of the report:

> This is another of those cases where an order is asked for which entitles the plaintiff to enter the premises of the defendant with the latter's permission for the purpose of inspecting documents. Such orders have been described as resembling search warrants.
>
> So far as I know, the only recently reported cases in this field are *EMI Ltd v Pandit* [1975] 1 WLR 302 and *Anton Piller KG v Manufacturing Process Ltd* [1976] 2 WLR 162. In the former case, Templeman J made such an order and in the latter, the Court of Appeal, reversing Brightman J, also did so and laid down clear principles as to when and subject to what conditions such orders can be made. In addition to the reported cases, the registrar has produced for me copies of similar orders which were also made in *Pall Europe Ltd v Microfiltrex Ltd* [1976] RPC 326 and *Universal City Studios Inc v Mukhtar & Sons Ltd* [1976] FSR 252.
>
> The present matter came before me ex parte on 12 May, and Mr Laddie, who seems to have cornered this part of the legal market, appeared as usual for the plaintiffs. As I was satisfied that the facts in this case fully justified my holding that it fell within the principles of the Anton Piller case and that preservation of the plaintiffs' confidential information and its denial to the defendants was urgent, I forthwith made the order which is set out hereafter. I was informed that the order could be drawn up as a matter of urgency after the hearing and that the search procedure contemplated by that order could be carried out next morning at the first defendants' works and second defendants' home respectively.

In the courts, it has become a routine dispensation to grant injunctions to protect basic rights and to prevent wrongs. The law of injunctions is so universal and all-embracing that there is scarcely any branch of legal relationship that has not been decided by the courts. It is trite law that the grant or refusal of an injunction, whether temporary, perpetual or mandatory, is a matter pre-eminently within the discretion of the court. This discretion has to be decided and exercised in a judicial manner in the light of the facts and circumstances of each case by applying certain well recognized principles settled, as it were, in judicial precedents, both foreign and local, from older times right down to the present day. This judgment attempts to do just that.

One must not forget that an Anton Piller order does not involve forcible entry but rather it would make the defendant liable for contempt proceedings if he disobeyed the order (*EMI Ltd & Ors v Pandit* [1975] 1 All ER 418 at p 421; [1975] 1 WLR 302 at pp 304–305). Fortunately, the defendants here obeyed the order and now sought by inter partes to set aside that order.

Enclosure 8 contained a variety of orders. It ranged from Mareva injunction against the fourth defendant, an interlocutory injunction against Dato' Wong and Wong Geok Cheong and indirectly affected the fourth defendant's manufacturing operations by way of an Anton Piller. Enclosure 8 crippled the fourth defendant. Mr Gana Muthusamy, the learned counsel for the defendants, submitted that the Mareva and

A interlocutory injunctions paralyzed the fourth defendant's factory and resulted in the laying off workers, cessation of production and affected all export orders. It was pointed out that the fourth defendant had exposed themselves to several suits for breaches of contracts. The fourth defendant's reputation, so it was submitted, had been affected especially in the manufacturing sector. No doubt the Anton Piller order was a drastic B remedy but it was a necessary evil. On the authority of *Thermax Ltd v Schott Industrial Glass Ltd* [1981] FSR 289, it was sought to argue that there was a failure to make a full disclosure and the Anton Piller order should be set aside. With respect, I preferred the decision of Sir Nicolas Browne-Wilkinson VC in the case of *Dormeuil Freres SA & Anor v Nicolian International (Textiles) Ltd*, where his Lordship rightly held that non- C disclosure of material facts should not be determined in interlocutory proceedings but rather at the trial proper.

In regard to the crippling of the fourth defendant's business particularly the cessation of production, reference to the affidavit of Isao Kuraishi, that was affirmed on 15 January 1997, as reflected in encl 12, drew a startling D discovery. At para 7(a) of encl 12, Isao Kuraishi deposed, inter alia, as follows:

> I wish to inform the court that the products manufactured by the first plaintiff and third defendant are not similar to that manufactured by the fourth defendant as they differ in colour, shapes, chemical content, texture E and other specifications. When a customer who purchased the products manufactured by the fourth defendant, they are not in any manner misled that the same are products manufactured by the first plaintiff and third defendant.

That being the case the fourth defendant was perfectly free to produce their F products without any fear that their products would infringe those of the first plaintiff and the third defendant. There should not be any worry on the fourth defendant's part in breaching the order of this court in encl 8 and there would also not be any catastrophic consequences that may flow from encl 8.

At para 6 of encl 12, Isao Kuraishi deposed that the quality of the G products produced by the fourth defendant was far superior to that produced by the plaintiffs. If this averment was true, then the submission of Mr N Chandran, for the defendants, that encl 8 had catastrophic effect was untrue. The fourth defendant should not be heard to complain about encl 8 if they held onto the notion that their products were far superior to that of the plaintiffs. Submissions must be at tangent with the affidavits and should H not be formulated to mislead.

The bulk of Mr Gana Muthusamy's submission was on the issue of passing-off. Mr M Pathmanathan argued that the plaintiffs' causes of actions were not grounded on passing-off but rather on breach of fiduciary duties and breach of trust by both Dato' Wong and Wong Geok I Cheong. The only reference in the entire statement of claim that relate to passing-off can be seen at para 13 and the particulars thereof at para (a). For ease of reference they are now reproduced hereinunder:

13 The breach of fiduciary duties and breach of trust committed by the first defendant and second defendant have caused the plaintiffs and the third defendant to suffer serious damages. A

Particulars

(a) Goods manufactured at the factory premises of the fourth defendant Supertex Mfg Sdn Bhd have been sold and passed off as manufactured by the plaintiffs and/or the third defendant Supertex Industries Sdn Bhd. B

Mr M Pathmanathan rightly submitted that, firstly, the defendants in their submissions and in their affidavits had failed to address or rebut the real issues that confronted the court. The documents obtained from effecting the Anton Piller order showed the magnitude of the misdeeds of both Dato' Wong and Wong Geok Cheong who, inter alia, had used the company's cheques to purchase shares for themselves. Secondly, the cheque butts contained false entries and the purported payments to the plaintiffs which were not received by the plaintiffs. Thirdly, the plaintiffs customers were misled. Both Dato' Wong and Wong Geok Cheong used the plaintiffs' invoices and payments were received by the fourth defendant. Many more misdeeds by these two personalities have been itemized in great detail in the early part of this judgment and its repetition became unnecessary. C D

To understand the meaning behind the words 'passing-off', it is now opportune to examine some salient authorities on the subject matter.

The then Supreme Court in a majority judgment in *Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd* [1994] 2 MLJ 770, speaking through Gunn Chit Tuan CJ, had this to say in regard to passing-off as reflected at pp 781–782 of the report: E

> The principle of law regarding passing-off has been plainly stated by Lord Parker in *Spalding v Gamage* (1915) 84 LJ Ch 449; 32 RPC 273, 'and that is, that nobody has any right to represent his goods as the goods of somebody else'. It is therefore wrong for a trader to conduct his business as to lead to the belief that his goods or business are the business of another. For an authority on passing-off, we could do no better than to quote the words of Lord Diplock in the leading speech in *Erven Warnink Besloten Vennootschap v Townend & Sons (Hull) Ltd & Ors* [1979] AC 731 at p 742; [1979] 2 All ER 927; [1979] 3 WLR 68: F G
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> > 'My Lords, *AG Spalding & Bros v AW Gamage Ltd* 84 LJ Ch 449 and the later cases make it possible to identify five characteristics which must be present in order to create a valid cause of action for passing-off: (1) a misrepresentation; (2) made by a trader in the course of trade; (3) to prospective customers of his or ultimate consumers of goods or services supplied to him; (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence), and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so.' H

Lord Scarman in *Cadbury Schweppes Pty Ltd & Ors v Pub Squash Co Pty Ltd* [1981] 1 All ER 213, had this to say in regard to passing-off at p 218 of the report: I

A But competition must remain free; and competition is safeguarded by the necessity for the plaintiff to prove that he has built up an 'intangible property right' in the advertised descriptions of his product, or, in other words, that he has succeeded by such methods in giving his product a distinctive character accepted by the market. A defendant, however, does no wrong by entering a market created by another and there competiting with its creator. The line may be difficult to draw; but, unless it is drawn, competition will be stifled. The test applied by Powell J in the instant case was to inquire whether the consuming public was confused or misled by the get-up, the formula or the advertising of the respondent's product into thinking that it was the appellants' product.

The Singapore High Court in the case of *Hille International Ltd v Tiong Hin Engineering Pte Ltd* [1983] 1 MLJ 145, held that there was no passing-off as the colours and shape used in the manufacture of polypropylene shell were common to the trade.

In *Tong Guan Food Products Pte Ltd v Hoe Huat Hng Foodstuff Pte Ltd* [1991] 2 MLJ 361, the Singapore Court of Appeal had this to say on passing-off at p 362 of the report:

> The law
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> The law of passing-off is well established. The appellant must establish reputation in the get-up, misrepresentation and likelihood of damage. In this case, proof of likelihood of damage rather than damage is needed because the pleadings were amended to reflect this.
>
> Reputation in the get-up
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> Get-up was defined by Fletcher Moulton LJ in *JB Williams & Co v Bromley & Co Ltd* (1909) 26 RPC 765, as 'a capricious addition to the article itself — the colour or shape it may be, of the wrapper or anything of that kind.' He added: 'I strongly object to look at anything, that has a value in use, as part of the get-up of the article.' In *Jarman & Platt Ltd v I Barget Ltd* [1977] FSR 260, Megaw LJ was prepared to be less restrictive in considering what constituted get-up and considered the possibility of get-up consisting of 'the characteristics of the product itself such as the shape or colour of the article itself'. He observed however that in such a case, the necessary proof of reputation was not easy and held that in the case before him, reputation was not proved.

Having read these authorities in some detail, I am constrained to say that the law relating to passing-off is simple to state but very difficult to apply. Why should it be so difficult was amply explained by the dissenting judgment of Wee Chong Jin J in *Asian Organization Ltd v White Husdon & Co Ltd* [1962] MLJ 139 at pp 140–141, which was fortunately approved by the Privy Council in *White Hudson & Co v Asian Organization Ltd* [1965] 1 MLJ 186 at p 189. The learned judge said:

> The fundamental and indeed the only principle of law involved in such an action is this, that nobody has any right to represent his goods as the goods of somebody else. From this cardinal principle it has been laid down that for a plaintiff in a passing-off action to succeed he must establish first, that the particular get up which he has been using has become associated exclusively

with his goods, ie he must establish reputation and secondly, that the defendant's get-up is such as is likely to deceive or cause confusion. Therefore, whether a defendant has violated this principle or not is a question purely of fact.

In *Words and Phrases, Judicially Defined*, a 1990 edition of the Malayan Law Journal Pte Ltd at p 241, the term 'get-up' is aptly explained in these words:

> It is essential for the plaintiff in an action for passing-off to prove ... that his goods ... have acquired a reputation in the market ... What does 'reputation' mean in this context? The meaning is to be found in the following passage from the judgment of Lord Evershed MR in *Tavener Rutledge Ltd v Specters Ltd* [1959] RPC 355 at p 362. 'It was laid down many years ago that the first necessity for a plaintiff trying to make out a case of passing-off is that he must establish that the particular get-up which he has been using has become associated exclusively with his business; what in brief, is called reputation.' What does 'get-up' mean? In my opinion, the get-up of goods is the general appearance presented to purchasers. It includes the size and shape of packages, the material, colour and decoration of their wrappers, and the lettering and arrangement of their labels: see Kerly's *Law of Trade Marks and Trade Names* (8th Ed), at p 376.' *Asian Organisation Ltd v White Hudson & Co Ltd* [1962] MLJ 139 at p 142, per Ambrose J.

AG Spalding & Bros v AW Gamage Ltd (1915) 32 RPC 273, laid down the five characteristics of the common law action of passing-off. They may be stated as follows:

(1) a misrepresentation;

(2) made by a trader in the course of trade;

(3) to prospective customers of his or ultimate customers of goods or services supplied by him;

(4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence); and

(5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or ... will probably be so.

In simple language, Lord Wright explained the meaning of passing-off in *Francis, Day & Hunter Ltd v Twentieth Century Fox Corp Ltd & Ors* [1939] 4 All ER 192 at p 200; [1940] AC 112, in these words:

> The thing said to be passed off must resemble the thing for which it is passed-off. A frying pan cannot be passed off as a kettle.

Parke, Davis & Co v Empire Laboratories Ltd [1964] SCR 351 laid down the following principles:

> Firstly, to succeed in a passing-off action, the plaintiff must establish that there is a distinguishing feature to his goods and that his goods are known and have acquired a reputation by reason of the distinguishing feature. Secondly, the plaintiff must show that the defendant passed off his goods for those of the plaintiff.

In *Oxford Pendaflex Canada Ltd v Knorr Marketing Ltd et al* (1982) 64 CPR (2d) 1, it was held that the common law tort of passing-off is

committed by a person who uses a get-up in association with a product in such a manner as to convey to the public the message or the impression that the product of the defendant is that of, or for that matter and is in some manner connected with the business of the plaintiff.

In my view no one is entitled to make, either directly or indirectly, a false representation that his goods are the goods of another (*Reddaway v Banham* (1896) 13 RPC 218; *Singer Manufacturing Co v Loog* (1881) 18 Ch D 395). It is correct to say and I so say that the false representation is the nub of the action; the umbilical cord or the central position that takes the centre of attention (*Spalding & Bros v Gamage* (1915) 32 RPC 273 at p 284). It is purely a question of fact whether there has been a false representation or otherwise. When there is no deception or an intention to deceive, the court will invariably be reluctant to find that there is a likelihood of deception — this is all the more so where the goods have been in the market for a very long time as envisaged in *Claudius Ash, Sons & Co Ltd v Invicta Manufacturing Ltd* (1912) 29 RPC 465. From the long line of authorities, it is correct to say that deception or likelihood of deception is the basis of passing-off and anyone can describe his goods in whatever manner he wants so long as he does so without deception (*Burberrys v Cording & Co Ltd* (1909) 26 RPC 693; *Cope v Evans* (1874) LR 18 Eq 138). There was affidavit evidence that both Dato' Wong and Wong Geok Cheong used the fourth defendant to sell its products to the customers of the plaintiffs and the third defendant. If that was not passing-off, I do not know what is. Mr M Pathmanathan was very adept and he stressed on breaches of fiduciary duties and trust as the focal points of the plaintiffs' claims. Looking at the statement of claim, Mr M Pathmanathan was perfectly right to hold onto that argument. The statement of claim was well drafted. So was the order of this court that was handed down on 8 January 1997 as reflected in encl 8 which, among others, restrained Dato' Wong, Wong Geok Cheong and the fourth defendant by themselves or by their directors, employees, agents or servants or otherwise from manufacturing, exporting, selling or offering for sale cosmetic sponge products similar to and/or closely resembling the first plaintiff's cosmetic sponge products and/or the third defendant's products. There was affidavit evidence that both Dato' Wong and Wong Geok Cheong diverted the cosmetic sponge business from the third defendant to the fourth defendant when the third defendant ceased operation. Cosmetic sponge products were marketed to cosmetic companies which eventually become powder puffs for famous cosmetic products like Shishedo, Estee Launder, Kanebo, Chanel etc. These were big businesses that raked millions and it was for that reason that the fourth defendant was set up to substitute the third defendant who had by then died a natural death.

I have painstakingly followed the guidelines set out by Gopal Sri Ram JCA in *Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah & Ors* [1995] 1 MLJ 193, in tackling encl 6 particularly the three approaches enunciated by his Lordship at pp 206–207 which were as follows:

> To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:

First, he must ask himself whether the totality of the facts presented before him disclose a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand, if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

Secondly, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see: *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee;

Thirdly, the judge must have, in the forefront of his mind, that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130 and applied in *Cheng Hang Guan* . It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

To discharge the order of this court in encl 8 would be disastrous. The plaintiffs would be left with no remedy at all. If all the documents that were seized as a result of the Anmton Piller order were returned to the fourth defendant, there would be nothing for the plaintiffs to rely upon at the trial proper. The justice of the case favours the plaintiffs and, consequently, the order in encl 8 should remain till the disposal of the whole suit in a trial proper.

Lest I be accused of an oversight, I will now proceed to the submissions of Mr N Chandran, the learned counsel for the defendants, who raised two interesting points of law. Firstly, he submitted that if the granting of the injunction will be catastrophic, then the court will refuse to grant that injunction.

My attention was drawn to the case of *Potters-Ballotini v Weston-Baker* (1976) 120 Sol Jo 231, where the brief facts were as follows. There the defendants were employed by the plaintiffs, manufacturers of tiny glass beads, in key positions; their service agreements contained covenants restraining competition and use of 'know-how' on termination of the agreements. The defendants left their employment and set up a rival factory. It was held that although the plaintiffs had a prima facie case for the grant of interlocutory injunctions, there were serious issues of fact and law arising from the defence and the grant of an injunction would be catastrophic to the defendants, and, consequently, such relief would have to await the trial. Factually, the facts in the instant case are poles apart from *Potters-Ballotini v Weston-Baker*. Here, there was no service agreements between the parties and there were no covenants restraining competition and use of 'know-how' on the termination of the agreements. Here, it was a simple case of ceasing the third defendant in order to flourish the fourth defendant. Now, the undertakings by an employee that he will not, upon leaving the employment, set up or join a competitive business, solicit former customers or disclose or use trade secrets are enforceable so long as they are reasonably necessary to protect the employer otherwise it would be an undue restraint of trade and be void as being contrary to public policy. Covenants of this nature do not exist in the instant case.

Mr N Chandran relied heavily on the case of *Walter Knott (Trading as Suedflex Schleifmittal) v Chew Swee Loon Industries Sdn Bhd* [1983] 2 CLJ 39, a decision of that brilliant judge, Edgar Joseph Jr J (now senior FCJ). Walter Knott cited and applied favourably the principles enunciated in *Potters-Ballottini v Weston-Baker* and there his Lordship Edgar Joseph Jr J (now senior FCJ) remarked at p 44 of the report:

> So, applying the test of balance of convenience, which Lord Diplock emphasised in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 would ultimately depend upon the facts of the particular case, I find as a fact that more would be at risk for the defendants if the injunctions were allowed to remain in force. In any event, there would be better prospects of the plaintiff recovering the moneys allegedly due to him, should he succeed at the trial, if the defendants are allowed to resume their business operations.

It seemed that the plaintiff in *Walter Knott* sought for the injunctions simply because the defendants there had not kept to the payment schedule as set out in Article IV of the know-how agreement. On this point, his Lordship Edgar Joseph Jr J (now senior FCJ) said at p 44, left hand column:

> I think there may be substance in Mr Chandran's submission that the only reason why the plaintiff sought the injunctions is because he claimed that the defendants had not kept to the payment schedule as appearing in Article IV of the know-how agreement. It has been alleged by Chew Swee Han, the

> chairman of the defendant company, in para 8 of his affidavit affirmed to on 15 September 1982, and not challenged nor contradicted by the plaintiff, that the defendant company is incorporated under the Companies Act with a paid up capital of RM250,000. It has been submitted (and this too has not been challenged by the plaintiff) that for this reason the plaintiff's claims, if successful, could be recovered from the defendants. On this further ground also the defendants are entitled to an order dissolving the injunctions.

On the facts, *Walter Knott* too are poles apart from the instant case. Here, an award of damages would not be an adequate compensation to the plaintiffs were they to succeed at the trial in obtaining permanent injunctions. The balance of convenience or the balance of justice or the justice of the case sided the plaintiffs than the defendants in the instant case. The result would be obvious. Enclosure 8 to remain till the final disposal of the trial.

The second submission of Mr N Chandran went like this. The undertaking as to damages was unsupported by tangible evidence as to the means of the plaintiff to satisfy that undertaking. It was pointed out that:

(a) It was a mere assertion that the second plaintiff was worth more than RM80m without proof of credit worthiness.

(b) There was no tangible evidence of any property owned by the second plaintiff.

(c) There was no tangible evidence to show that the second plaintiff was in a good and sound financial position to honour its undertaking.

On the undertaking as to damages, the affidavit of Mitsuhiko Sakamoto in encl 5a at para 17 bears repetition. It was worded thus:

> The plaintiffs do give an undertaking to this honourable court to abide by any order as to damages which may be ordered to be paid to the defendants by this honourable court in the future.

The second plaintiff is a substantial company with net assets more than RM80m. It owns property in Malaysia and is therefore in a sound financial position to honour its undertaking.

Dato' Wong's affidavit in encl 17 at para 41 was worded thus:

> In reply to para 17 of M Sakamoto's affidavit, I wish to inform this honourable court that (the) undertaking by (the) plantiff(s) are insufficient to meet the damages incurred by the fourth defendant and pray that (the) court order dated 8 January 1997, be set aside and damages suffered by (the) defendants (to) be assessed by the senior assistant registrar.

Isao Kuraishi affirmed an affidavit in encl 12 and at para 8, at the last sentence, he deposed that:

> The damages undertaken by the first and second plaintiff(s) are not adequate to meet such losses suffered by Nakamura.

Two observations must be made here. Firstly, the defendants did not say that their damages exceeded RM80m. Secondly, the defendants did not say that the plaintiffs cannot make good the undertaking of RM80m.

A It is the practice of the courts to require the plaintiff to undertake to abide by any order the court may subsequently make for the payment of damages to the defendant for the loss suffered because of the grant of the injunction. Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, must have envisaged the possibility of a 'wrong' decision being made at the interlocutory stage to be real and not imaginary, and at B p 509a his Lordship had this to say:

> ... when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made on contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time ex hypothesis the existence of the right or C violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action.

It is obvious that the purpose of the undertaking is to simply vest to the court with the necessary jurisdiction to make the appropriate orders to recompensate the loss suffered by the defendant when it is subsequently D established that the plaintiff was not entitled to the injunction in the first place. Unless and until such an undertaking is given, the defendant wrongly enjoined will hardly have any recourse against the plaintiff (*Attorney General v Albany Hotel Co* [1896] 2 Ch 696 at p 699). An undertaking as to damages is always required before the court grants an interlocutory injunction. Consequently, it is a correct statement of the law to say, on the authority of E the *American Cyanamid*'s case at p 510, that the ability of the plaintiff to honour his undertaking is a pivotal or a material factor in the balance of convenience. But money is not everything. The courts will not deny the poor plaintiff an interlocutory injunction simply because of his limited financial resources (*Allen & Ors v Jambo Holdings Ltd & Ors* [1980] 2 All ER 502). Poverty do not bar the right to an injunction if the circumstances F warrant it. In the event there may be difficulty in enforcing the plaintiff's undertaking, either because the plaintiff might not be worth 'powder and shot' then the plaintiff is obliged to fulfill his undertaking (*The Mito* (1987) 2 Lloyd's Rep 197 at p 198). And if the plaintiff is outside the jurisdiction, the court may require him to give an undertaking by way of a security (*Baxter v Claydon* [1952] WN 376). The best form of security would be by G way of a bank guarantee (*Castle Fitness Consultancy Pte Ltd v Manz* [1990] 1 MLJ 141). The court too may even be magnanimous and allow an undertaking to be given by a person who is not a party to the action but who is within jurisdiction (*Ferragmo v Lotus & Delta Ltd* (1950) 67 RPC 175). In practice, the court will not embark on an elaborate investigation as to the H financial means of a particular plaintiff. A bare undertaking, like the present case, is sufficient. Here, the plaintiffs went beyond the call of duty when they disclosed that the second plaintiff was worth RM80m. It was on the defendants' part, if they doubted this kind of undertaking, to garner evidence to show the financial status of the second plaintiff by way of affidavit evidence. Nothing of that sort was forthcoming from the I defendants.

For the reasons adumbrated above, the order of this court dated 8 January 1997, as reflected in encl 8 must remain till the disposal of the

civil suit. An early date for the hearing of the civil suit was accordingly fixed for five days in the month of March. To be exact, the hearing dates were scheduled on the 2, 12, 13, 16 and 20 of March 1998.

Events have overtaken the otherwise smooth hearing of the civil suit. The defendants filed an application in encl 104, for the stay of the hearing of the civil suit scheduled in the month of March 1998. Enclosure 104 was supported by an affidavit in encl 103 that was affirmed by Dato' Wong on 28 February 1998. The defendants were not happy that the hearing of the civil suit has been expedited and they wanted the stay as they had appealed against my decision and they wanted the Court of Appeal to dispose of the appeal before the civil suit proceeded for trial. There was an averment in encl 103 that the fourth defendant had suffered financially and had lost clients. Yet, in the same breath it was averred that the hearing dates for the civil suit was too close for comfort as they could hardly prepare for the trial. In other jurisdictions, early trials would be appreciated and grabbed by the parties. Not so here. Mr Gan Techiong for the plaintiffs opposed the application for the stay and it was clear that the summons for directions had just been filed. In *Ajaib Singh v Jeffrey Fernandez* [1971] 1 MLJ 139, the respondent's application for stay of proceedings had not been promptly made and he too had not satisfied the court that serious or irreparable injury would result to him if the stay was not granted and, consequently, the respondent's application was dismissed with costs. Here, encl 104 was promptly filed and the parties have yet to bundle up their documents for the trial proper. The defendants were said to be handicapped in preparing the bundle of documents because of the Anton Piller order. I was hesitant and was unwilling, initially, to agree to encl 104 but the case of *Ajaib Singh v Jeffrey Fernandez*, swung the pendulum in favour of the defendants. Enclosure 104 was then allowed with no order as to costs. The hearing dates in March 1998 were grudgingly vacated.

Injunction granted affirmed.

Reported by Ng Sheau Jiuan